

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 21-cr-491

Plaintiff,

April 25, 2024
10:09 a.m.

vs.

PAUL SPIVAK,
OLGA SMIRNOVA,
CHARLES SCOTT,
CHRISTOPHER BONGIORNO,

Defendants.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE J. PHILIP CALABRESE
UNITED STATES DISTRICT JUDGE

Official Court Reporter: Susan Trischan, RMR, CRR, FCRR, CRC
7-189 U.S. Court House
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1 THURSDAY, APRIL 25, 2024, 10:09 A.M.

2 THE COURT: Please be seated.

3 Good morning.

4 We're on the record in Case Number

10:09:57 5 1:21-cr-491, the United States of America versus Paul
6 Spivak and others.

7 Counsel, will you please state your
8 appearances for the record?

9 MR. ABREU: Good morning, Your Honor.

10:10:08 10 Assistant U.S. Attorney Alex Abreu for the
11 United States of America, and with me today is FBI
12 Special Agent Anthony Fry.

13 MR. AXELROD: Good morning, Your Honor.

14 David Axelrod along with Lauren Engelmyer
10:10:23 15 on behalf of Paul Spivak.

16 MR. ROSEN: Judge, good morning.

17 Michael Rosen on behalf of Christopher
18 Bongiorno.

19 MR. DeVILLERS: Good morning, Your Honor.

20 David DeVillers on behalf of Charles Scott.

21 MR. McCAFFREY: Your Honor, John McCaffrey
22 and Melissa Kelly on behalf of Olga Smirnova.

23 THE COURT: Well, good morning.

24 We're scheduled today for oral arguments on
10:10:47 25 the various pending motions, which I am still very much

1 working through, so I look forward to hearing from all of
2 you to help me in those efforts.

3 Let me start by telling you how I'm
4 thinking about the motions, which will also tell you how
10:11:09 5 structurally I think it makes sense to proceed this
6 morning.

7 So as I see it -- and I'm speaking in broad
8 strokes here -- I know everyone's captioned their motions
9 technically differently so I'm not glossing over that,
10:11:26 10 and I know that will be significant and important as we
11 move forward.

12 But as I see it, there's functionally three
13 groups of motions.

14 There's Rule 12 motions, there's motions to
10:11:41 15 sever, and there's -- I suppose the last group would be
16 what I would call evidentiary motions. I think those are
17 principally the motions to suppress that Mr. Bongiorno
18 filed.

19 And I think that's roughly the order in
10:12:10 20 which I'm approaching them and thinking about them
21 structurally.

22 Of any of the motions to dismiss, I know
23 that one -- I call them Rule 12 motions, but I know the
24 one is pre-indictment delay motions, so again I'm
10:12:25 25 speaking broadly here.

1 I know that if any of those are granted in
2 whole or in part they might have implications down the
3 line.

4 So what I'd like to do is take them in
10:12:36 5 those groupings, starting with the motions to dismiss,
6 and then moving on to the motions to sever, and then that
7 last group of motions, the evidentiary ones, last.

8 Again that's how I'm thinking about them
9 and working through them.

10:12:52 10 So with that, I'll just say one other thing
11 as a preface to apply to all of your remarks and
12 arguments.

13 You can either speak from counsel table in
14 which case please remain seated and speak directly into
10:13:10 15 the microphone, or speak at the podium. Either way, just
16 be sure you're speaking into the microphone for the
17 benefit of our court reporter.

18 So with that, I'd like to turn to the
19 motions to dismiss, and perhaps, Mr. Axelrod, I'll start
10:13:29 20 with you.

21 MR. AXELROD: Great. Thank you, Your
22 Honor.

23 And I'll come up. Old habits die hard.

24 THE COURT: I understand.

10:13:35 25 MR. AXELROD: And the way I think -- of

1 course, it's up to you -- but I think probably the way --
2 and we've talked about this -- the best way to structure
3 it is going sequentially through the motions.

4 So there's a motion to dismiss Count 1 and
10:13:50 5 the substantive counts related to Count 1. There's a
6 motion to dismiss Count 2 and the substantive counts
7 related to Count 2. And then there's the kind of, I
8 would call them, the obstruction counts like 48 and 50
9 that are at the end.

10:14:03 10 I'll be handling Count 1 and the
11 substantive counts, and then I think that Mr. McCaffrey
12 would like to weigh in after I do.

13 Ms. Engelmyer, who is a senior associate
14 working with me, will be handling Count 2, and then I'll
10:14:15 15 handle the other ones as well.

16 But, you know, I've done this a lot, Your
17 Honor, I'm not going to go chapter and verse through the
18 briefs because I know that you've read them so I'm going
19 to try to hit the high points, but of course if you have
10:14:27 20 any questions, I'm more than happy to answer those.

21 So we don't file these motions to dismiss
22 lightly.

23 And I understand the standard is generally
24 favorable to the Government and to what a grand jury
10:14:37 25 returns, but if you look at Count 1, it's a conspiracy to

1 commit securities fraud.

2 Conspiracy, of course, is its own criminal
3 act. It's an agreement to do something criminal, but
4 that's the rub, right? You've got maybe an agreement to
10:14:52 5 do something criminal.

6 If you're in agreement to trade stocks,
7 that's not criminal. And so really that's where Count 1
8 falls apart.

9 Here, the offense purports that -- the
10:15:03 10 purpose of the conspiracy purports to be to commit
11 securities fraud, but the problem with Count 1 is it does
12 not articulate a theory of securities fraud like a
13 legitimate or articulable legally cognizable theory
14 against Paul Spivak or Olga Smirnova.

10:15:21 15 And it's really not hard to describe
16 securities fraud.

17 I mean, securities fraud indictments are
18 filed all over the country all the time, and they
19 generally rest on the idea that the defendants were
10:15:30 20 involved in the conspiracy to somehow mislead investors,
21 whether through false statements or some types of -- some
22 type of false signal or some type of market manipulation.

23 But this count fails to do all of that, any
24 of that, which suggests an evidentiary problem. And I
10:15:46 25 think that the Government was creatively trying to get

1 around evidentiary holes in their case by structuring an
2 indictment that uses a lot of -- I'll use the term word
3 salad, but it's probably incorrect.

4 I mean, if you look at the indictment as I
10:16:00 5 did when I first came on the case, from afar it uses lots
6 of terms that sound in securities fraud. There's a part
7 in the beginning that says pump and dump and then there's
8 a part about Rule 144 letters. These are all common
9 phrases associated with securities fraud.

10:16:18 10 But when you actually drill down, Count 1
11 never actually says what the defendants, specifically
12 what my client Paul Spivak, did wrong and what his
13 knowledge was and what his intent was.

14 THE COURT: Well, is it sufficient for the
10:16:32 15 grand jury to charge a conspiracy to violate federal
16 securities laws, and to leave the specifics of that to be
17 proved at trial?

18 I mean, I'm not aware of a specific
19 requirement. I mean, it's not a 9(b) civil pleadings
10:16:49 20 standard, for example.

21 MR. AXELROD: I certainly agree that it's
22 not a 9(b) and 9(b) does not apply here, but I do think
23 that there has to be an articulable theory, a legally
24 cognizable theory of securities fraud that has to be
10:17:02 25 alleged because otherwise, the grand jury returned an

1 indictment of conspiracy to do something that's legal,
2 which of course is not a crime.

3 THE COURT: Well, so one of the things I've
4 been working through is whether -- so we talked about
10:17:15 5 Count 1, Count 2, and I think again in broad stroke
6 perhaps to shorthand it, it should be Count 1 and the
7 substantive related counts, Count 2 and the substantive
8 related counts.

9 So at some level does Count 1, to approach
10:17:33 10 your motion and your argument, require turning to the
11 substantive related counts first?

12 And if they charge a violation of federal
13 securities law, then the question becomes is there a
14 conspiracy that's charged?

10:17:47 15 MR. AXELROD: I haven't looked at it that
16 way. I haven't thought about it that way.

17 Generally, the way you see most
18 indictments, the way they're structured is you kind of
19 have Count 1 which sets out the overarching scheme,
10:18:00 20 right? And then the substantive counts refer back to
21 that count and incorporate them.

22 I mean, I think the substantive counts are
23 all plainly infirmed in this case because if you look at
24 them -- and I'm kind of skipping now to the end of my
10:18:12 25 argument -- but if you look at them, I don't know -- and

1 I'm a practitioner of this, and I've been doing this for
2 15 years largely at the U.S. Attorney's Office in
3 Philadelphia and then at the SEC -- I can't tell what
4 Paul Spivak is alleged to have done to violate the
5 securities fraud statutes in the substantive counts,
6 which I'll get into by number, and in the wire fraud
7 counts that are attached.

8 But I think that problem is built really in
9 Count 1. So let me jump and I'll give you an
10 explanation.

11 So Paragraph 9 talks about a pump and dump,
12 generally. It just kind of lays out the groundwork for
13 what a pump and dump scheme is.

14 But Count 1 never alleges that the
15 defendants were actually engaged in a pump and dump
16 scheme. It never alleges a pump.

17 So, you know, when we talk kind of commonly
18 about a pump, what we're talking about is people
19 generally releasing false information into the market to
20 pump up the stock, to raise up the stock price.

21 Usually that's on message boards on the
22 Internet or it's on Facebook or on Twitter or whatever
23 may have you, but the real key of that is that it's false
24 information.

25 Here, if you look at Paragraph 32, this is

1 really telling, it says Spivak and others --

2 THE COURT: I'm sorry, which paragraph?

3 MR. AXELROD: Paragraph 32.

4 THE COURT: Thank you.

10:19:29 5 MR. AXELROD: Of the superseding, second
6 superseding indictment.

7 Spivak specific -- Spivak and others
8 arranged to artificially inflate the prices of USLG
9 shares by creating and releasing favorable -- this is the
10:19:41 10 key -- favorable press releases.

11 Now, it is not illegal to release favorable
12 press releases. If it were, every publicly traded
13 company in the United States would be indicted because
14 you know that anytime something good happens with
10:19:56 15 Twitter, Meta, whatever stock you may have, they issue a
16 press release because they want people to invest.

17 That's kind of the nature of our market.

18 Releasing favorable press releases is not
19 illegal.

10:20:11 20 It also, the problem with Count 1, is it
21 never alleges a dump. Usually in a pump and dump scheme,
22 the people are holding all the stock, pump up the price,
23 sell it to unsuspecting investors, and then the people
24 holding the stock then dump the shares to make money.

10:20:26 25 Well, my client, if you look at the

1 indictment, is never accused of dumping any stock. In
2 fact, he owns the majority of USLG, he has because he
3 founded the company, he's poured money into the company.
4 I think he owns like 50 million shares. And he's never
10:20:41 5 alleged to have sold any of them but-for a small few.

6 So there's no pump and there's no dump and
7 there's no falsity to drive up the price of the stock,
8 all right, so there's no pump and dump alleged.

9 Now, of course, securities fraud can also
10:20:55 10 be premised on making misrepresentations to investors.
11 That's a common scheme you see where people go out and
12 they say, "If you invest in this company, the value of
13 the share is going to go up 200 percent in the next year"
14 or "We've got all these great things going on," and it's
10:21:11 15 all false.

16 Here's also where Count 1 falls. If you
17 look at Paragraph 29 of the second superseding indictment
18 it says Mallion and others made material
19 misrepresentations to investors. Well, okay. It does
10:21:26 20 not say Paul Spivak knew about that, encouraged it, was a
21 part of it, had any knowledge.

22 THE COURT: If he's a co-conspirator, that
23 is going to be imputed to him as an evidentiary matter,
24 isn't it?

10:21:38 25 MR. AXELROD: I don't -- I don't think so.

1 I mean, I think in most cases where you
2 have co-conspirators involved in a conspiracy, especially
3 one to commit securities fraud, it would say that Spivak
4 encouraged Mallion and others to make misrepresentations
10:21:52 5 to investors.

6 THE COURT: Well, maybe if he's the kingpin
7 or what have you.

8 And I understand he's the first charged and
9 named defendant so maybe there's some inference or reason
10:22:03 10 to believe that's the case, but all of the actions of the
11 co-conspirators are generally, you know, charged to
12 another.

13 MR. AXELROD: I think that that's right
14 because generally in a conspiracy allegation, it alleges
10:22:18 15 that the co-conspirators had knowledge or it was all
16 reasonable/foreseeable, those actions of the fellow
17 co-conspirators.

18 Here there is no such allegation.

19 And I don't think just because it's charged
10:22:31 20 as a conspiracy that you can infer all those actions of
21 some co-conspirators to another.

22 I mean, it's very easy if the evidence
23 supported it, it would be very easy for the Government to
24 say that Paul Spivak had knowledge or Paul Spivak
10:22:44 25 encouraged or Paul Spivak knew that it was reasonably

1 likely that these people would go out and make
2 misrepresentations to investors.

3 It doesn't say that because I don't think
4 the evidence supports that.

10:22:55 5 THE COURT: Isn't that an inference from
6 some of the allegations where there's text messages and
7 conversations and things like that charged where the
8 focus is really on getting the stock price to certain
9 points, for example, to make payroll and things like
10:23:10 10 that?

11 So isn't a logical consequence of that and
12 in the procedural posture the Government would be
13 entitled to a natural inference that Spivak intends the
14 consequences of that?

10:23:22 15 He doesn't care how the price goes up or he
16 doesn't care how payroll is made; he just wants to make
17 sure that the capital is there, that the trades are
18 there, that the price goes up to allow that?

19 MR. AXELROD: I think that that is an
10:23:38 20 illogical leap based on what's in this indictment.

21 I think there could be certain allegations
22 that would support that, but I don't think that those are
23 found in this indictment.

24 I don't think that it follows that if
10:23:47 25 someone is interested in promoting the overall health of

1 their company, that it follows that they would be aware
2 or aware of or encouraging people selling stock to make
3 misrepresentations to investors.

4 I mean, and I don't want to talk about the
10:24:02 5 evidence because I know that that's inappropriate. That
6 will be done at a different time, so I'm really trying to
7 stick to the conspiracy.

8 And really what my bugaboo is about this is
9 that if all what you say is true, Your Honor -- and it
10:24:15 10 very well could be -- it would be very easy to write that
11 in an indictment, that Mr. Spivak knew, Mr. Spivak
12 encouraged, Mr. Spivak was aware that this was going on.

13 But all of that's missing from this
14 indictment.

10:24:29 15 And because of that, I think -- and I'll
16 get to this in a second -- when you flow to the
17 substantive counts, the wire fraud and the securities
18 fraud counts which require knowledge, intent of the
19 specific acts, I think that's where really this, this
10:24:45 20 omission or this absence in Count 1 really becomes
21 exposed.

22 But, you know, this is an indictment. This
23 is a heavy speaking indictment. There are over a hundred
24 specific overt acts that are discussed in Count 1, and
10:25:00 25 there's no allegations of knowledge of Spivak of any of

1 those misreps in any of those overt acts. And I think
2 that that absence is as telling as what's actually in the
3 indictment.

4 Because if Mr. Spivak -- I mean, you know,
10:25:14 5 I'll take a step back.

6 There's actually no overt act that talks
7 about any of those misrepresentations specifically
8 either.

9 There's this general statement in
10:25:23 10 Paragraph 29 that, you know, Mallion made material
11 misrepresentations, but if on, for instance, December
12 13th of 2016 -- I'm making this up -- that Mr. Mallion
13 said to one investor, "USLG is going through the roof,
14 they're designing the space shuttle," right, obviously
10:25:39 15 that's insane, but if that were in the indictment, that
16 would be a very specific material misrepresentation.

17 But none of that's in the indictment
18 either.

19 And so really what it's trying to do, what
10:25:48 20 this indictment does is it talks in generalities about
21 things you generally find in a securities fraud
22 indictment without containing the specifics that I think
23 are required under the law to go forward with a
24 conspiracy of this type.

10:26:07 25 And I'll give you one other example. So

1 one other common type of securities fraud is market
2 manipulation. And now I'm not talking about --
3 necessarily about a pump and dump but, you know, maybe
4 match trades, painting the wire.

10:26:18 5 And so if you look at Paragraph 24, there's
6 an allegation that says Mallion, Church and others used
7 manipulative stock trading techniques to artificially
8 inflate the share price of USLG. That's Paragraph 24 of
9 the second superseding indictment.

10:26:34 10 Again, you don't see any overt acts that
11 talk about this, but more importantly there's no
12 imputation of knowledge, encouragement, anticipation by
13 Spivak anywhere in the indictment.

14 And so if this is a conspiracy to engage in
10:26:49 15 market manipulation like by sending false signals to
16 investors about volume, about interest, things of that
17 nature, there's nothing that shows that my client had
18 knowledge, participation, encouragement, reasonably
19 anticipated. All of that is absent from Count 1.

10:27:05 20 And it would be very easy, if the evidence
21 supported it, to include such an allegation. And, you
22 know, again I'm not arguing the evidence, but I think
23 it's very clear that the omissions, the absences in this
24 count demonstrate that there is something underlying this
10:27:23 25 case about why those things could not be included in this

1 count.

2 And I think it's infirmed as it's written,
3 but I think there's an underlying evidentiary problem.

4 THE COURT: And so one of your arguments is
10:27:37 5 that the Government has not charged kind of a particular
6 recognized theory of securities fraud, or maybe it's
7 mixing and matching and borrowing from both or from
8 multiple of them.

9 But is there a requirement in the law that
10:27:54 10 they charge one specifically?

11 MR. AXELROD: Well, there is a requirement
12 that it -- that the crime alleged is specifically precise
13 that a client -- that a defendant could avoid double
14 jeopardy, right?

10:28:08 15 So, yes, I would say there is. But I think
16 there's also --

17 THE COURT: At some level from that
18 standard isn't the broader the allegation or charge, the
19 better for your client in the sense that it's notoriously
10:28:21 20 difficult to get convictions in white collar cases for a
21 host of reasons we don't need to go into -- I don't know
22 whether this is such a case or not -- but it seems to me
23 that if it is, that the broader the charge, I mean if the
24 charge is simply this is a 10b-5 violation as alleged,
10:28:37 25 then any conduct that falls within 10b-5 is going to be

1 barred.

2 MR. AXELROD: Yes. I guess that's true.

3 I think this is more of a problem for the
4 substantive counts, but I think that there also is a
10:28:49 5 legal requirement that -- like, I know that the
6 Government loves to say that, "An indictment is
7 sufficient as long as we restate the statute and the
8 elements in the statute."

9 I mean, that's not -- that's not quite
10:29:00 10 true.

11 And here, I don't think that this satisfies
12 the Rules. And I'm thinking of the -- one second -- the
13 *Hamling* case that requires a statement of facts and
14 circumstances demonstrating what the count is.

10:29:14 15 I don't think that it's sufficient under
16 *Hamling* and also the *Howard* case, which the Government
17 cites, to simply throw all these -- this word salad of
18 securities fraud terms in an indictment and then say,
19 "You go figure it out."

10:29:27 20 I don't think that's sufficient under the
21 law. I don't think that provides sufficient notice of
22 what the claim is, and I don't think it sufficiently
23 alleges a securities fraud violation.

24 So that's kind of the crux of the Count 1,
10:29:41 25 and then I'll just move into the substantive counts if

1 you're ready for that.

2 THE COURT: Sure.

3 MR. AXELROD: So I mean, I think really the
4 problems with Count 1 -- the lack of specificity, the
10:29:52 5 lack of an overarching theory and the lack of allegations
6 of knowledge, engagement, anticipation -- all those
7 things really come out when you look at the substantive
8 counts.

9 When you look at the securities fraud
10:30:06 10 counts and the wire fraud counts, it is impossible for a
11 practitioner like me to determine what the Government
12 actually alleges is illegal.

13 And so -- I'm just grabbing my indictment.
14 So Count 5, for instance, let's go to Page 35 of the
10:30:25 15 second superseding indictment -- the pincite is 1443 --
16 Count 5 just lists October 14th, 2016, 20,000 shares,
17 defendant charged Spivak, proceeds of sale \$5,000.

18 And this actually cross-references to Count
19 1 in Paragraph 41-ff, and that is on Page -- I actually
10:30:55 20 forgot to write down the page, but it is on Page --

21 THE COURT: I believe it's Page 11 of the
22 second superseding indictment.

23 MR. AXELROD: Okay. Thank you, Your Honor.
24 No, 41-ff is --

10:31:07 25 THE COURT: Oh, yeah. No, it's not.

1 I apologize.

2 MR. AXELROD: No worries.

3 It's Page 18.

4 And (ff) says that, "On or about October
10:31:17 5 13th, 2016, Arthur and Bongiorno caused Victim 5 to send
6 a check for \$5,000 to USLG account," blah, blah, blah,
7 "for the purchase of USLG shares."

8 There's nothing to do with Spivak in that
9 overt act.

10:31:33 10 And then if you go and you look at the
11 securities fraud alleged on Page 35, it says Spivak
12 committed securities fraud and repeats the statute above,
13 but there's no -- you're left guessing what Paul Spivak
14 actually did to commit securities fraud with respect to
10:31:48 15 Count 5.

16 I mean, you can cross-reference and go back
17 and look, but it doesn't say what Arthur and Bongiorno
18 did either. Did they engage in a pump and dump to get
19 this investor to invest? Did they lie to him about the
10:32:00 20 stock?

21 THE COURT: Well, it sounds like the
22 allegation is that the investor was defrauded as part of
23 the conspiracy.

24 So I kind of go back to isn't the
10:32:10 25 conspiracy charge -- you know, doesn't that suffice to

1 sweep that alleged misconduct in?

2 MR. AXELROD: I don't -- I don't think so
3 because, I mean, to be guilty of securities fraud, you
4 have to have knowledge and intent.

10:32:25 5 It does not anywhere in this indictment
6 state specifically on Page 35 what Spivak had knowledge
7 of, what he intended to do.

8 And then if you cross-reference it back to
9 Count 1, that's also missing there.

10:32:45 10 It does not indicate what was illegal. It
11 does not state Spivak's knowledge. I mean, you're just
12 left guessing and I'm still guessing. I don't know.
13 I've looked at discovery. I've looked at this indictment
14 a million times. I don't know.

10:33:01 15 I mean, I'm guessing that I won't know
16 until trial, and to me that's a problem with the
17 indictment. A criminal defendant should not be left
18 guessing.

19 THE COURT: Well, isn't that more of a
10:33:12 20 problem with the criminal justice system at large?

21 I mean, I can tell you any number of cases
22 where defense lawyers have told me they didn't know what
23 the theory of the prosecution was until the key witness
24 took the stand.

10:33:26 25 I would say it shouldn't be that way.

1 That's why we have discovery in civil cases. I don't
2 know why we don't have depositions and so forth in
3 criminal cases. That's a different problem we're not
4 going to solve today.

10:33:36 5 MR. AXELROD: I agree, and I'm not -- I do
6 think it is a problem, but I'm not attacking the criminal
7 justice system at large because I think in most cases --
8 take a drug case.

9 THE COURT: It's okay if you do, but we're
10:33:47 10 just not going to solve that today.

11 MR. AXELROD: Yeah, but I recognize I'm
12 talking to a Judge and not a Congressman or a Senator or
13 the President, so I'm appealing to the person I'm
14 speaking to.

10:33:57 15 But if you're talking about a drug case or
16 a gun case or a threats case, right, you allege a date
17 and place, that's sufficient, right?

18 When you're talking about securities fraud
19 where you're dealing with an incredibly broad statute, I
10:34:09 20 think it behooves Federal Judges in your position to help
21 defendants out.

22 I think the law requires it.

23 And I know that some Judges aren't --

24 THE COURT: It's not clear to me from that
10:34:17 25 standard what more specificity you want.

1 You have a Victim 5, so presumably you have
2 some ability to make an identification on that, but even
3 if you don't, you have a specific date, financial
4 institution, and so forth.

10:34:31 5 I'm not sure what else can be -- you have a
6 number of shares and so on.

7 MR. AXELROD: Well, yes, you have a victim,
8 you have a date. But what's the fraud is really my
9 problem.

10:34:43 10 Well, if he was lied to, what was the lie?
11 If my client knew about it, say my client knew about it,
12 but this indictment doesn't say that.

13 And I do think that there is a requirement
14 in the law, if you look at the cases, for the Government
10:34:58 15 to say what the fraud was. And I don't know why this
16 indictment doesn't do so.

17 And I think that this problem gets even
18 worse when you look at the other securities fraud counts
19 that aren't even cross-referenced in the indictment.

10:35:11 20 So if you look at Counts 6 through 12 and
21 18 through 19, there is no cross-reference to any of the
22 100 overt acts in the indictment.

23 I have no idea what those are premised on
24 besides someone investing. Don't know who talked to
10:35:33 25 them, don't know why they invested, don't know what the

1 alleged theory of those, those crimes are.

2 I mean, we really are left guessing, but
3 again forget guessing. This indictment does not allege
4 that Spivak had knowledge, intent with respect to those,
10:35:50 5 those instances.

6 I mean, it says it generally when it
7 repeats the statutory language, but it wouldn't be hard
8 for an indictment -- and I don't think this is asking
9 more than what the law requires -- for the indictment to
10:36:01 10 say that on September 16th, for instance, of 2016, this
11 person misrepresented something to Investor A and Spivak
12 knew about it.

13 THE COURT: But you're not asking for any
14 more specificity with respect to the particular kinds of
10:36:18 15 crimes charged in the second superseding indictment than
16 any other criminal charge generally.

17 MR. AXELROD: No. No.

18 Just want to know --

19 THE COURT: You're not -- you're not saying
10:36:30 20 there's a 95 Reform Act for securities fraud on the
21 criminal side as well is all I'm trying to get at.

22 MR. AXELROD: Correct. That is absolutely
23 right. I'm not -- I'm not saying that.

24 I'm just saying that this does not meet the
10:36:42 25 standards that are required to give due notice to a

1 defendant of what he's been charged with.

2 Is there a tissue, Your Honor? Thank you
3 very much.

4 And the problem with this is I do think
10:37:03 5 there's a double jeopardy issue with these substantive
6 counts, right?

7 Because let's say there's no statute of
8 limitations issue, let's be hypothetical here, but let's
9 say with Count 5 that the Government went to trial and
10:37:17 10 their theory with respect to Count 5 was that Arthur,
11 this person Arthur lied to this investor and that
12 investor invested.

13 Okay, jury comes back not guilty.

14 There's nothing preventing the Government,
10:37:30 15 based on this substantive count, from coming forward and
16 saying, "Okay, we're kidding, he actually invested
17 because of the pump and dump scheme because he was misled
18 based on what he read on the Internet."

19 There's nothing in this that I think would
10:37:43 20 prevent that argument from going forward.

21 THE COURT: I'm not -- I mean, I understand
22 your argument. I'm not sure I agree with that given the
23 way the Government has charged it.

24 I mean, I think charging the 10b-5 is going
10:37:54 25 to broadly encompass the various theories that the

1 Government has, you know, not in your view alleged.

2 So I think they would be, you know, bound
3 or precluded under each of them, especially with a
4 general verdict.

10:38:08 5 MR. AXELROD: Okay. But there's -- I mean,
6 there's a second problem, too, that I have not raised,
7 but I thought about last night.

8 Because of how broad this is, and because I
9 think it's insufficient, the grand jury may have indicted
10:38:20 10 Count 5 based on the notion that this investor was misled
11 in a verbal or oral conversation.

12 But at trial, the Government could
13 say -- could decide that maybe the evidence isn't great
14 on that point any more, and could shift its focus to a
10:38:35 15 market manipulation theory.

16 I think that would be an unlawful,
17 unconstitutional variance from what the -- from what the
18 grand jury indicted, and I think that because of the lack
19 of specificity in the indictment, we're really opening up
10:38:47 20 the possibility of error.

21 Now, largely my arguments about substantive
22 wire fraud are the same. For wire fraud, the Government
23 must prove the defendant said something false. It's
24 impossible for me to determine, with the wire fraud
10:39:05 25 counts, what Mr. Spivak is alleged to have done to commit

1 wire fraud, really in all of the counts.

2 And there's another problem, and I know
3 that we argued about this in our initial brief. It
4 appears -- but I don't know again because the indictment
10:39:22 5 doesn't say so -- that a portion of the Government's
6 theory is this idea of undisclosed broker payments; that
7 there was an omission by brokers, that they did not tell
8 investors that there would be broker commissions.

9 And if you look at the wire fraud counts,
10:39:37 10 I'll throw one out at you -- well, I won't throw one out
11 at you; I'll just tell you -- it looks like there's a
12 number of wire fraud counts that allege a commission
13 payment going to a broker for bringing in a share of
14 stock, a sale of stock.

10:39:56 15 We submitted cases -- there's the Skelly
16 case out of New York and actually the case the Government
17 submitted out of the Ninth Circuit is aligned -- an
18 omission is not a fraud unless there's a fiduciary duty
19 or a duty to speak.

10:40:10 20 With the relationship between the brokers
21 alleged in this indictment and the investors, there is no
22 fiduciary duty so there, I mean --

23 THE COURT: There is a line of cases, at
24 least on the civil side -- I haven't had a chance yet to
10:40:23 25 run it down on the criminal side of securities fraud --

1 that that might be true unless and until you open your
2 mouth and speak, at which point you have a duty to
3 disclose all material information.

4 So I mean, does that line of cases come
10:40:37 5 into play on the criminal side?

6 MR. AXELROD: I mean, I think it does,
7 right?

8 An omission -- a material omission can make
9 an overt statement false, right?

10:40:48 10 So hypothetically, if one of these brokers
11 said -- well, this would be an outright lie, but if one
12 of these brokers said that there's no commission
13 payments, right, then the omission that there was would
14 be false.

10:41:02 15 But here there's no such allegation in the
16 indictment. So you are correct, Your Honor, about that
17 line of cases, but I don't think that even comes into
18 play because there's no allegation that there was any
19 duty to speak here because of what was said.

10:41:13 20 THE COURT: And I should ask this.

21 I have not had a chance to keep up with
22 news this week. I believe the Supreme Court decided an
23 omission case this week.

24 Does that have any -- first of all, is that
10:41:24 25 right? And second of all, if so, does it have any

1 bearing on this?

2 MR. AXELROD: Your Honor, I was in trial
3 the last two weeks in Arizona.

10:41:33

4 THE COURT: So you're in the same boat I
5 am.

6 MR. AXELROD: Unfortunately, I am.

7 THE COURT: Okay.

8 MR. AXELROD: And we talked about, but I
9 just haven't had a chance to look at it.

10:41:38

10 THE COURT: I have not either.

11 MR. AXELROD: I don't think that Supreme
12 Court case is a significant shift in the law, but I'm
13 ignorant so I'll be quiet about that now.

14 THE COURT: Okay.

10:41:45

15 MR. AXELROD: But because of this, this
16 broker issue, I mean if, if that is what the Government's
17 theory is with respect to the wire fraud and the
18 securities fraud cases, then I think that there's another
19 significant issue that I haven't touched on yet that the
20 grand jury was not accurately or adequately advised of
21 the law regarding the Government's theory.

10:42:02

22 And --

23 THE COURT: And so that's the issue on
24 which you're seeking the disclosure under Rule 6 of the
25 instruction?

10:42:15

1 MR. AXELROD: Partially.

2 Primarily we're seeking that with respect
3 to the Count 2 and the entrapment instruction.

4 But what worries me more about this is that
10:42:26 5 because of the lack of, I think, sufficiency of the
6 indictment, we can't tell what the Government's theory
7 is, so it's possible that the grand jury was adequately
8 instructed, but it's possible they weren't.

9 We just can't tell.

10:42:41 10 And again, you run into issues of variance.
11 You run into issues of improper instructions. And this
12 all flows from the fact that it is not difficult to
13 construct an indictment that actually says what the
14 allegations are and what the theory is.

10:42:55 15 And for some reason this is -- this
16 indictment, I think, is intentionally vague and
17 intentionally lacking in specifics I think because the
18 facts don't support it, but it really does cause a huge
19 notice problem and creates all types of ancillary legal
10:43:10 20 problems for my client.

21 That's it.

22 THE COURT: All right. Thank you.

23 Why don't we stick with Count 1 before
24 turning to Count 2?

10:43:19 25 So if there's anyone else who, on the

1 defense side, who wants to argue on Count 1.

2 MR. McCaffrey: Good morning, Your Honor.

3 John McCaffrey on behalf of Olga Smirnova.

4 As the Court is aware, Ms. Smirnova is only

10:43:47 5 charged in two counts in this indictment, Count 1 and

6 Count 2, both conspiracy counts.

7 I'm going to focus on Count 1 right now,

8 Your Honor.

9 Count 1 covers a four-year time period from

10:44:01 10 2016 through 2019. And as this Court is well-aware,

11 conspiracy is an inchoate offense which requires facts

12 from the Government demonstrating a specific intent of a

13 specific defendant to commit an offense, to enter into an

14 agreement to commit an offense.

10:44:22 15 I echo -- and Ms. Smirnova is not charged

16 in any of the substantive securities fraud counts that

17 accompany Count 1. I echo Mr. Axelrod's issue that there

18 is insufficient notice being given to Ms. -- to his

19 client, but even more so to Ms. Smirnova who is only

10:44:43 20 charged with a conspiracy.

21 I, again, I can't tell what the theory of

22 the prosecution is, and I think the biggest issue here is

23 what was -- what was the explanation that was given to

24 the grand jurors as to what it was that Ms. Smirnova was

10:45:03 25 agreeing to enter into.

1 What was the nature of the theory of the
2 securities fraud that she was agreeing to, you know,
3 enter into an agreement to advance the commission of
4 those offenses?

10:45:19 5 There is no notice as to any specific
6 statements or conduct constituting the formation of the
7 agreement that involved Ms. Smirnova.

8 The mere fact of being married to one of
9 the defendants, the mere fact of working at the same
10:45:39 10 company as one of the defendants, as this Court knows, is
11 wholly insufficient.

12 There's no facts demonstrating that she
13 engaged in any specific conduct demonstrating her
14 knowledge of a specific securities fraud scheme.

10:46:00 15 And I want to just quickly point out to the
16 Court why this is problematic for the Government, and I
17 want to direct the Court to a series of overt acts that
18 are alleged in Count 41.

19 The Count 41, as it relates to
10:46:20 20 Ms. Smirnova, identifies only ten text messages involving
21 communications which the Government alleges establish
22 Ms. Smirnova's knowledge of the specific object and
23 purpose of the conspiracy.

24 Six of those ten text messages include
10:46:42 25 exchanges with several other individuals, and

1 Ms. Smirnova happens to be one of the people that is
2 included on the text.

3 And the six text messages -- six of those
4 text messages all occur in a fairly tight time frame in
10:47:03 5 September of 2016, and then the sixth text message is in
6 November of 2016.

7 This is a four-year conspiracy, Your Honor.
8 And these are these six text messages that don't show
9 that she saw or read the text message, that she acted on
10:47:21 10 the text message, that she had an understanding of the
11 subject matter that was being discussed in the text
12 message, or that she engaged in any conduct before or
13 after showing some form of knowledge.

14 I mean, I -- I think the Court can take
10:47:37 15 judicial notice of, you know, just because you're
16 included on a text message does not necessarily mean that
17 you read it or understood what was -- what was being
18 discussed.

19 THE COURT: From a charging standpoint,
10:47:51 20 though, isn't that a fact question to be argued to a
21 jury?

22 MR. McCaffrey: It is, but I think that
23 from the stage that we're at right now, the Government
24 has to at least establish what the evidence is that she
10:48:05 25 entered into a conspiratorial agreement.

1 Just because she's on a text message does
2 not establish that basic requirement.

3 I want to talk about -- so I talked about
4 the six text messages of the ten that just include her on
10:48:23 5 it. There's four text messages in Paragraph 41 where she
6 does have communications and does respond.

7 All of those, each of those four text
8 messages is with a specific individual that's Laura Lesh
9 who was the Vice President of Finance and Administration.
10:48:45 10 She's a woman that is very knowledgeable about
11 securities. She's got a -- she has a Series 7 license, a
12 Series 52 and a 63 license.

13 THE COURT: Isn't Ms. Smirnova during this
14 time the Chief Operating Officer, or do I have that
10:49:00 15 wrong?

16 MR. McCAFFREY: She's -- I don't know that
17 she's the Chief Operating Officer.

18 She is essentially a purchasing agent at
19 this time.

10:49:07 20 THE COURT: She's a senior executive,
21 however you cut it.

22 MR. McCAFFREY: I mean, she is -- yeah, I
23 mean she's, I guess, as senior as you can be in a small
24 company like USLG.

10:49:21 25 But the first text message, Paragraph 41-xx

1 occurs on April 12th, and it's a text message mentioning
2 Mr. Mallion and USLG shares, and they're talking about
3 how they are going to see Richard on Friday.

4 Well, Your Honor, and again we raise in, I
10:49:49 5 think, in particular with respect to Count 2 the issue of
6 context and how was this, how was this portrayed to the
7 jury.

8 What's going on is April -- April 12th is
9 there's a proceeding coming up. There's a proceeding
10:50:02 10 that was filed in Lake County where Mr. Mallion was sued,
11 and this relates to the fact that they're going to see
12 him, and apparently he has a proposal connected with that
13 lawsuit.

14 That has nothing to do with the securities
10:50:16 15 fraud conspiracy.

16 The second text --

17 THE COURT: I mean, I guess as I look at
18 the text message, I mean, I take the point that it's out
19 of context.

10:50:25 20 MR. McCAFFREY: Yes.

21 THE COURT: And I mean, that ultimately
22 seems to be a fact question; not a -- not a question of
23 sufficiency of the indictment under the governing
24 standard.

10:50:35 25 MR. McCAFFREY: I think it's a -- I think

1 it goes to how was this explained to the grand jury in
2 the context of this defendant, Ms. Smirnova, is involved
3 in a -- she entered into an agreement to violate
4 securities fraud.

10:50:50 5 THE COURT: Well, I mean, apparently the
6 grand jury believed that there was probable cause that
7 the proposal was not what you're arguing but a proposal
8 for a coordinated activity to manipulate the stock price
9 for the purpose under 10b-5 of defrauding investors or
10:51:05 10 manipulating the market.

11 MR. McCAFFREY: I submit, Your Honor, I
12 don't know that they had any understanding of it.

13 But let's go to the next two text messages,
14 which both occur in October 23rd, 2017 and involve an
10:51:19 15 exchange again with Laura Lesh.

16 And the first one, Paragraph 41-ddd, this
17 is talking about information from DTC.

18 Your Honor, that refers -- DTC eligibility
19 is essentially a depository --

10:51:38 20 THE COURT: Right.

21 MR. McCAFFREY: -- and is trying to
22 determine whether or not they can check with DTC to
23 determine whether or not they can see who it is that is
24 essentially trading or trading in these securities, and
10:51:54 25 that gets to the NOBO designation which is the

1 Non-Objecting Beneficial Owner.

2 If that particular owner doesn't object to
3 being disclosed on the DTC depository, then you could
4 find out who it is, but Laura Lesh --

10:52:15 5 THE COURT: I mean, it sounds like -- I
6 mean, I think what Mr. Abreu would say, I'm not
7 saying -- I mean, this is a fact question ultimately it
8 seems to me, but it sounds like one plausible
9 interpretation of that is that it's enforcement activity
10:52:28 10 where Ms. Smirnova, at the direction of Mr. Spivak or
11 others in a conspiracy, are trying to figure out who's
12 acting at cross-purposes.

13 MR. McCAFFREY: But how does -- how is
14 that, Your Honor, conduct demonstrating her specific
10:52:45 15 intent to enter into a conspiracy to violate the
16 securities statutes?

17 That's what I'm getting at is where is the
18 proof of the specific intent?

19 The only way I can divine that is through
10:52:59 20 looking at the specific overt acts alleged.

21 And I'll go to the last one, Your Honor,
22 because I think this is -- this is really a very
23 important one when we talk about context, and that's
24 Paragraph 41-eee -- I'm sorry -- 41-ttt, which is on
10:53:20 25 April 12th of 2018.

1 And it's talking about Ms. Lesh says that
2 she has sold her USLG shares, and Ms. Smirnova says, "I'm
3 glad you did it."

4 What's not explained is Ms. Lesh left in
10:53:39 5 November of 2017. There are a series of many e-mails
6 between these two. They stayed in touch. They both had
7 babies at the same time.

8 And it just so happens this, this
9 conversation with this reference occurs ten days after
10:54:04 10 Ms. Lesh had already sold her 25 units of USLG shares
11 that she was granted back in 2016 as part of her package.
12 She was granted these shares as part of her employment
13 package.

14 And, I mean, what would you expect? "Oh,
10:54:23 15 good for you, I'm glad you did, it's already done," but
16 none of that context is presented here.

17 It's offered to the grand jury as just raw
18 meat to this is evidence of specific intent to enter into
19 a conspiracy.

10:54:41 20 And importantly, there are, and the
21 Government produced in discovery, there are many texts
22 between the time that Ms. Lesh left USLG in November of
23 2017 up through this conversation in April of 2018.
24 There is no discussion about USLG shares, there's no
10:55:07 25 discussion whatsoever. If there was, you'd surely see it

1 here, but there's nothing.

2 This is completely taken out of context.

3 So, Your Honor, I go back again to the
4 sufficiency of the evidence as it relates to this
10:55:23 5 particular defendant, Ms. Smirnova's specific intent to
6 enter into a conspiracy.

7 There is nothing in the overt acts that
8 demonstrates that she entered into a conspiracy to
9 violate the securities laws.

10:55:35 10 Thank you.

11 THE COURT: All right. Were you getting up
12 a moment ago, Mr. Rosen, on Count 1?

13 MR. ROSEN: May I, Your Honor?

14 THE COURT: Yes.

10:55:54 15 MR. DeVILLERS: Just briefly, there's a
16 couple things I want to point out, that my client
17 Mr. Scott in Count 1 is that there's these general
18 allegations in the first paragraph of Count 1, and then
19 every overt act after that with my client is just
10:56:09 20 buying/selling stock and wiring money.

21 Nowhere in there does it talk about any
22 sort of material misrepresentation or knowledge of
23 material misrepresentation to stockholders or to would-be
24 stockholders.

10:56:25 25 THE COURT: There was some allegations in

1 the second superseding indictment, at least two that I
2 remember, that the last trade of the day was specifically
3 made to raise the stock price from, you know, whatever,
4 from 18 cents to 29 cents, or whatever the case may be.

10:56:41 5 Was that -- were those allegations
6 involving transactions that Mr. Scott was involved in?

7 I just don't recall that specifically.

8 MR. DeVILLERS: I don't believe they were.
9 That was 2016.

10:57:01 10 MR. AXELROD: Yeah. Those allegations
11 relate to Church; not Scott.

12 MR. DeVILLERS: Yes. Yes.

13 THE COURT: Fair enough. Yes.

14 That's -- thank you. That's the question I
10:57:10 15 was trying to ask, which defendant was charged or
16 implicated in those trades.

17 MR. DeVILLERS: Yeah, the trades that are
18 referred to here --

19 THE COURT: And the fact that you're
10:57:20 20 struggling in response to my question suggests that it
21 was not Mr. Scott.

22 MR. DeVILLERS: Yes.

23 There are --

24 THE COURT: I suspect you would have it at
10:57:27 25 your fingertips if it were.

1 MR. DeVILLERS: Yes. I understand, Your
2 Honor.

3 So buying and selling stock, there's no
4 indication, other than the general first paragraph saying
10:57:34 5 he knew about this scheme to misrepresent the purchases
6 of stock.

7 Do you have any questions from me, Judge?

8 THE COURT: All right. No, that was my
9 primary one.

10:57:49 10 Thank you.

11 MR. ROSEN: Good morning, Your Honor.

12 May I be the first to nominate you to the
13 Federal Judicial Rules Committee so we can impose some
14 depositions?

10:58:02 15 THE COURT: I don't know what I've done to
16 offend you to put me in that position so.

17 MR. ROSEN: Caught my attention is what you
18 did.

19 Judge, the case that you were referring to,
10:58:11 20 I'm going to spell it, it's Macquarie, the Supreme Court
21 case that just came out this week, it's Macquarie
22 Infrastructure, M-A-C-Q-U-A-R-I-E, versus Moab, M-O-A-B,
23 and it was a couple weeks ago, April 12th, 2024.

24 THE COURT: I guess I've been busier longer
10:58:31 25 than I thought. I would have thought it was at the end

1 of last week or the beginning of this week, so I'm really
2 falling behind.

3 My apologies.

4 MR. ROSEN: No. No. No.

10:58:38 5 It does discuss 10b-5 and it does discuss
6 fraud and it does discuss the fact -- actually it's a
7 unanimous decision which really --

8 THE COURT: I think that was a civil case,
9 wasn't it?

10:58:49 10 MR. ROSEN: It was a civil case, that's
11 correct.

12 And it speaks to a defendant, in this case
13 a company, cannot be guilty of fraud where they failed to
14 speak if they had no duty to speak.

10:59:00 15 And so in --

16 THE COURT: I mean, it caught my attention
17 earlier in discussing with Mr. Axelrod because of the
18 brokerage commission point.

19 MR. ROSEN: Correct. I agree.

10:59:16 20 And I do think that it may have some
21 application here. I'm not sure to a motion to dismiss,
22 but I read it so it caught my attention as to the
23 application in this case, albeit a civil case.

24 THE COURT: The issue occurred to me, and I
10:59:28 25 said I have to read that before today, and here we are.

1 MR. ROSEN: Now you don't.

2 THE COURT: Well, now I have to read it
3 after today.

4 MR. ROSEN: Your Honor, the only thing I'm
10:59:36 5 going to add to any of this is that I have a pending
6 motion to adopt these arguments.

7 THE COURT: Yes. Yes.

8 MR. ROSEN: And I just to want make sure
9 the Court grants it so I've got an argument to be -- to
10:59:47 10 be a part of this. I'm not going to --

11 THE COURT: Yeah, I'll give you the spoiler
12 alert now.

13 I'm going to grant all of those motions
14 just so that everyone's record is preserved.

10:59:56 15 MR. ROSEN: I'll stop talking.

16 Thanks, Judge.

17 THE COURT: Fair enough.

18 All right. On Count 1, Mr. Abreu, any
19 response on your part?

11:00:06 20 MR. ABREU: Just briefly, Your Honor.

21 Your Honor, I think our response in
22 opposition covers most of what the defendants have argued
23 today and what they've written, and basically my point
24 and my argument is that the defendants would like to
11:00:33 25 expand the requirements that -- of what is sufficient to

1 plead a criminal charge in a criminal case.

2 This is not a civil case. As the Court
3 knows, this, on a 371 conspiracy, so for Count 1 and
4 Count 2, the Government was -- needs to prove one overt
11:00:54 5 act.

6 I have to allege one overt act, and we
7 alleged over a hundred.

8 THE COURT: On the part of any
9 co-conspirator.

11:01:02 10 MR. ABREU: On the part of any
11 co-conspirator; not every co-conspirator.

12 The Government does not need to put in
13 specific factual allegations and specifically say that a
14 specific conspirator knew exactly what this other person
11:01:17 15 was doing to -- for that person to be guilty or for that
16 person to be charged.

17 THE COURT: I think, as I read through the
18 briefs that the defendants have filed and as I listen to
19 their arguments today, I think I primarily have two, two
11:01:34 20 concerns that I struggle with or -- and I'm still working
21 through, as you can tell.

22 One is whether -- because I've seen this in
23 other cases -- one is whether the grand jury is
24 approaching a very -- a fact pattern that's not one with
11:02:02 25 which you deal every day as a layperson. Right?

1 This is not necessarily -- it's more, more
2 in the nature of regulatory *Mallum Prohibitum* than *Mallum*
3 *In Se* , although, you know, depending on the nature of
4 the fraud -- and I get that there's some allegations here
5 that that could be taken to a level of *Mallum In Se*, but
6 let's set that to the side.

7 So in a complex set of financial
8 transactions that a grand jury is not day-in and day-out
9 going to be familiar with from their everyday lives, I
10 have some concern that -- and Mr. Axelrod spoke a bit to
11 this -- but, you know, the concern is just is this
12 conduct unseemly but not illegal, and is the grand jury
13 returning indictments for wholly legal, if -- you know,
14 you don't want to look too hard at the sausage-making
15 sometimes, but, you know, are they charging the violation
16 of a criminal law based on perfectly legal conduct?

17 MR. ABREU: So, Your Honor, I think the
18 best response to that is to look at the elements of
19 securities fraud, the way it's charged.

20 And the first element is that the defendant
21 knowingly, either employed a -- basically a scheme or
22 made any untrue statement or omitted a material fact
23 necessary to make the statement made true during the
24 course of the sale of a security, in connection with a
25 purchase of a security that used interstate commerce, and

1 acted with the intent to defraud.

2 So really it's the intent to defraud and a
3 false statement.

4 Grand juries deal with that all the time.

11:03:55 5 That is the bread and butter of fraud.

6 At the very beginning, Mr. Axelrod's
7 argument makes it appear that there's only three types of
8 ways that you can commit securities fraud. That's
9 absolutely wrong.

11:04:09 10 There's infinite ways to commit securities
11 fraud. It just has to have a lie with an intent to
12 defraud in connection with the purchase of a security.
13 That's really what you need. That's what 10b-5 requires
14 and that is what fraud requires. That's what's required
11:04:28 15 for wire fraud, bank fraud.

16 The difference between all of those crimes
17 are usually one element related to here it was in
18 connection with the purchase or sale of a security.

19 In bank fraud, it's that it was to obtain
11:04:44 20 bank property or affected a bank.

21 In wire fraud, it's that you used a wire.

22 In mail fraud, it's that you needed a
23 mailing.

24 All the same requirements in terms of
11:04:54 25 falsity.

1 So I don't think that this is particularly
2 hard for a grand jury to grasp because as soon as you say
3 fraud, what you're really talking about is there a lie
4 and did the person act with the intent to defraud.

11:05:08 5 THE COURT: Well, I guess part of that and
6 some of the concerns that the defendants are raising is
7 that there's some cherry-picking going on, there's
8 certain statements that are being taken out of context
9 and, you know, if you look at one line of a text message
11:05:22 10 it sounds pretty bad, but if you put it into a broader
11 context.

12 So I mean, what's ultimately the way to
13 police that?

14 Do you have to impanel a jury? I mean,
11:05:33 15 that's an awfully heavy burden for any defendant.

16 MR. ABREU: Your Honor, to police
17 cherry-picking in terms of an indictment and what
18 language the Government chooses to put in the indictment,
19 Your Honor, the grand jury has a fair amount of latitude
11:05:52 20 to consider what it considers. It's done in secrecy.

21 And unless the defendants meet the high bar
22 of actually showing that there is some irregularity, not
23 just some "We don't know what the grand jury did because
24 we don't like the way that this is alleged so give us the
11:06:12 25 grand jury transcripts," Courts see that all the time and

1 reject those arguments because the grand jury is afforded
2 that deference to conduct and exercise its role to find
3 that there's probable cause and to determine who to
4 charge and who not to charge.

11:06:31 5 Your Honor, the -- whether -- what's in the
6 indictment is policed by the Court ultimately.

7 I haven't had a trial with you yet, Judge,
8 and so I don't know if you allow the indictment to go
9 back with the jury. Lots of Courts don't.

11:06:47 10 The indictment is not evidence. There's a
11 jury instruction expressly on the indictment not being
12 evidence.

13 Most jurors never see the indictment. The
14 indictment is simply to put the defendants on notice of
11:07:01 15 what they're charged with, and doesn't require the amount
16 of the specificity that the defendants claim that is
17 required here.

18 THE COURT: Well, and on the notice point,
19 I'm going to struggle moving through the second
11:07:20 20 superseding indictment again, but I guess when I look at
21 Page 35, Page ID 1443, this is the Count 5 example that
22 Mr. Axelrod was working through earlier, I mean he says,
23 you know, other than the fact that on the line and the
24 table identifying Mr. Spivak as the defendant charged in
11:07:43 25 Count 5, there's no connection to Mr. Spivak whatsoever

1 when you trace it through.

2 So what -- what from a notice perspective,
3 what knowledge does he actually have so that he can be
4 prepared on the trial date to meet that allegation?

11:07:57 5 MR. ABREU: Your Honor, aside from the
6 factual allegations that are incorporated into the
7 counts, it's that the defendant, Paul Spivak, had the
8 knowledge and used the instruments of interstate commerce
9 to employ a device, made a -- you know, the A, B and C of
11:08:17 10 10b-5, and that gives him the exact notice of what it is
11 that he's alleged of doing, the date that the act
12 occurred on October 14th, it was 20,000 shares, and there
13 was \$5,000 proceeds of that stock sale.

14 THE COURT: And in the context of a
11:08:36 15 conspiracy charge, I understand that this is the
16 substantive charge that's related, so presumably if, when
17 you trace it through, if Mr. Spivak is not directly
18 involved with that transaction, he'd be involved as a
19 member of the conspiracy as charged.

11:08:51 20 But it's a little bit hard for Mr. Axelrod
21 to sit down with his client and Mr. Axelrod says, "Come
22 on, sir, you must have some knowledge." He says, "No,
23 look, I don't know, on October 14th I was in France," or
24 whatever it was, "Like, I wasn't involved in this," so it
11:09:06 25 becomes a little bit -- I mean, you understand the

1 problem from the trial preparation side.

2 MR. ABREU: I do, Your Honor.

3 But looking at the incorporated
4 allegations, Paul Spivak is the CEO of the company. He
11:09:18 5 is at the top of this conspiracy as alleged in the
6 indictment.

7 He is the one who was issuing the stock.
8 He is the one with the relationships and hired
9 the -- what was the language he used in his advertisement
11:09:34 10 on Craigslist? He needed --

11 THE COURT: He needed Wolves of Wall
12 Street.

13 MR. ABREU: Wolves of Wall Street and
14 bullshit artists, right? He's the person who recruited
11:09:44 15 these individuals, so yes.

16 10b-5, 78j(b), the Title 15 offense,
17 includes aider and abettor liability. There is a
18 conspiracy, and so he is -- that's why Paul Spivak is
19 charged with most of these counts.

11:10:05 20 And, frankly, many defendants can be
21 charged with these counts. It's just that the grand jury
22 indicted Mr. Spivak on all of the counts that they
23 indicted him on.

24 Could others be indicted for them? Yes.

11:10:19 25 Could Ms. Smirnova be indicted for several of these

1 counts? Absolutely. Was she? No.

2 Is that a decision that the Government and
3 the grand jury -- the Government made to present to the
4 grand jury and the grand jury ultimately made? Yes.

11:10:30 5 Is that permissible? It happens all the
6 time, Your Honor.

7 THE COURT: So let me -- on -- since you
8 mentioned Ms. Smirnova, let me, you know, raise one issue
9 or concern there.

11:10:42 10 This is not necessarily a question that
11 goes to sufficiency of the charge or the second
12 superseding indictment necessarily, but you would agree
13 that at least on the face of the indictment there's a lot
14 less implicating her or directly involving her.

11:11:02 15 MR. ABREU: There is, Your Honor.

16 And an exercise of prosecutorial discretion
17 limited her to two counts with five years stat maxes for
18 a particular reason.

19 That's my decision to make, the United
11:11:19 20 States' decision to make in terms of asking the grand
21 jury to return an indictment against Ms. Smirnova.

22 Could we have charged her with more? Yes.
23 Could we have proved those charges? I think we can, but
24 we elected not to.

11:11:31 25 And what we include in the indictment is a

1 mere drop in the bucket in terms of the evidence that's
2 been provided to the defendants in discovery.

3 THE COURT: Was it -- was it four
4 terabytes? Do I remember that right, or am I confusing
11:11:48 5 that with a different case?

6 MR. ABREU: It's about four terabytes. It
7 could be anywhere from two-and-a-half to four terabytes,
8 depending on how it's broken out.

9 THE COURT: What's a terabyte amongst
11:11:58 10 friends?

11 MR. ABREU: Right.

12 But hundreds of text messages.

13 Ms. Smirnova is constantly text messaging back with the
14 Wolf of Wall Street types with Ms. Lesh.

11:12:10 15 Those, all of that, evidentiary issues. I
16 mean, Mr. McCaffrey said it, this is -- his issue is
17 that, you know, he doesn't believe there's enough
18 evidence for the grand jury to have properly indicted
19 Ms. Smirnova.

11:12:25 20 Again, he's arguing evidence. He's not
21 arguing that the indictment is insufficient or -- I mean,
22 they are arguing that, but they're blurring the line and
23 really arguing that the evidence is insufficient.

24 The -- if this were the upside down from
11:12:47 25 stranger things, right, the other side of these motions

1 are motions for Bills of Particular, right? "I don't
2 understand what I'm charged with. Give me more detail."

3 And this indictment gives them the exact
4 detail, a lot more detail than many conspiracy
11:13:03 5 indictments, by providing them with the types of
6 activities that they did, how they manipulated the USLG
7 stock, and what companies they used to do it, and then
8 lots of examples in terms of the overt acts that they
9 used to accomplish those objects.

11:13:19 10 I'm not sure what else the defendants
11 really want aside from an entire roadmap that would lay
12 out these are the three ways you -- these are the only
13 three ways you could be convicted of this crime because
14 you did X, Y and Z.

11:13:40 15 And that's just not the case.

16 THE COURT: So the other issue I wanted to
17 have you speak to, it's one I spent some -- but again not
18 enough -- time on to this point, and it's the commission
19 issue that the defendants have raised.

11:13:55 20 MR. ABREU: So I briefly looked at
21 the -- some summaries on that Supreme Court opinion.

22 I don't think it's going to change the
23 Court's determination of this case because I think the
24 Ninth Circuit case I cite, *United States versus Laurenti*,
11:14:16 25 is in line with that case.

1 And it's one that there is no general duty
2 to speak, and as the Court pointed out, until you do.

3 And here, if the Government cannot prove
4 that they had a -- that they omitted a material fact
11:14:39 5 after speaking, then, you know, I imagine that they'll be
6 making a motion -- well, they'll probably make a motion
7 anyway for Rule 29 directed verdict, but that would be
8 the appropriate time to argue that, you know, we did not
9 show that that defendant had created a situation where he
11:14:59 10 had to reveal this material fact that he was obtaining a
11 50 percent commission.

12 The fact is I think at trial what will be
13 shown is that these defendants asked an investor or
14 asked, you know, any investors as an example to invest
11:15:16 15 \$10,000 to buy X number of shares. It turns out those
16 numbers of shares really cost half of what they invested
17 because the other half of what they invested went to pay
18 them.

19 And so simply by stating \$10,000 for 20,000
11:15:32 20 shares, there's your fraud. That's the lie.

21 Were there other lies? Absolutely. Were
22 they using fake names? Yes. Were they misrepresenting
23 the amount, the hold period that they couldn't sell the
24 stock in? Yes.

11:15:46 25 There were lots of other

1 misrepresentations, but here the conduct of material
2 omissions in terms of the undisclosed commissions and the
3 kickbacks, certainly illegal.

4 The United States has --

11:16:03 5 THE COURT: Are there -- are there other
6 cases or other decisions coming out of other prosecutions
7 on that theory that I should be looking to to see how
8 they handled arguments like the ones the defendants have
9 advanced, or is this -- I had a different case where
11:16:23 10 there was a white collar prosecution where one of your
11 colleagues argued there was the first time the Department
12 of Justice has made such an argument so I shouldn't go
13 spend the time?

14 MR. ABREU: No, Your Honor.

11:16:38 15 I've personally charged this offense for
16 the last four years and convicted probably two dozen
17 defendants, including one in this court that the Court
18 accepted a plea from Jason Arthur for this very conduct.

19 There's another case pending in front of
11:16:56 20 Judge Oliver.

21 Several defendants were convicted, pled
22 guilty and were convicted of the same conduct before
23 Judge Pearson.

24 And Your Honor has another case with the
11:17:04 25 same undisclosed commissions being paid because this is

1 the issue with hiring Wolf of Wall Street types and
2 bullshit artists is that you have to pay them.

3 And if you tell investors what they're
4 actually being paid, they won't invest. And that --

11:17:23 5 THE COURT: Does it make a difference -- I
6 suppose this is a question for a jury ultimately -- but
7 does it make a difference if the -- I mean, it seems like
8 your theory turns on the actual fair market value as it
9 were of the stock, the consideration and the transaction
11:17:45 10 being half of what -- you know, the 50 percent sits on
11 top of fair market value.

12 But if the fair market value is, you know,
13 100 X, and the commission's being taken out of that, you
14 know, the investor is getting, you know, 100 X of value
11:18:09 15 and the commission's being taken out of what's being
16 delivered on the market side, I mean is that ultimately
17 the factual issue?

18 MR. ABREU: No, Your Honor.

19 I think the factual issue would be what the
11:18:23 20 investor is being told the money is being used for.

21 And if the money is -- if what --

22 THE COURT: I guess it's a materiality
23 question.

24 MR. ABREU: Correct.

11:18:33 25 THE COURT: Because if the -- if the

1 investor's getting close to fair market value for the
2 consideration paid, then I don't think the investor
3 necessarily cares whether the commission's one dollar or
4 \$10 or \$90 of the hundred.

11:18:49 5 If it's -- if the investor's actually
6 getting 50, the investor might care a lot.

7 But, you know, again, I don't have the
8 evidence at this point. I have talked about terabytes,
9 but I haven't certainly had them made available to me or
11:19:06 10 even spent any time, if they were, looking at them.

11 So I don't know if -- if any investor even
12 asked the question.

13 MR. ABREU: Your Honor, that's -- it's an
14 interesting point.

11:19:18 15 I don't know that I'm prepared to speak on
16 that issue in terms of specificity of what the --

17 THE COURT: If you don't speak, there's not
18 going to be a duty.

19 No, I couldn't resist. Sorry.

11:19:32 20 MR. ABREU: Oh.

21 But I think the general point is that they
22 were just told this money is to invest in this company.

23 These investors were, you know, invited to
24 fly out to Cleveland and toured the facility with
11:19:45 25 Mr. Spivak and, you know, had understandings of what

1 their money was supposed to be used for: The company;
2 not paying Mr. Bongiorno, Mr. Arthur 50 percent of their
3 investment.

4 And so, Your Honor, going back to the
11:20:10 5 arguments on Count 1, I -- wholesale, I think these are
6 arguments that are ripe for, you know, a post-trial
7 motion for a directed verdict, a Rule 29 motion.

8 You know, they're about the sufficiency of
9 the evidence. They have nothing to do with whether the
11:20:27 10 counts are alleged properly.

11 They have the notice that's required by the
12 law, and the Court should deny the motions as they are.

13 THE COURT: All right. Thank you.

14 Well, in the interests of time, and I do
11:20:47 15 think I certainly have work to do, I know you could
16 probably go another hour on Count 1, but I do want to
17 turn to Count 2 and there's other motions as well.

18 So if we could turn to Count 2.

19 MS. ENGELMYER: Good morning, Your Honor.

11:21:11 20 Lauren Engelmyer on behalf of Paul Spivak.

21 I will argue our motion to dismiss Count 2,
22 which we filed on behalf of both Paul Spivak and Olga
23 Smirnova.

24 There are three grounds to dismiss Count 2
11:21:27 25 of the second superseding indictment.

1 First, Count 2 should be dismissed because
2 it misrepresents the facts and suggests that there was an
3 error in the grand jury proceedings.

4 Second, Count 2 should be dismissed because
5 the Government entrapped the defendants.

6 And, third, Count 2 should be dismissed
7 because it fails to state a claim.

8 First, in Count 2, the Government presented
9 a false reality to the grand jury. Under Federal Rule of
10 Criminal Procedure 12(b) (3) (A) (v), a defendant can move
11 to dismiss an indictment based on alleged errors in the
12 grand jury proceedings.

13 According to the Supreme Court, in *Bank of*
14 *Novia Scotia versus United States*, dismissal on this
15 basis is appropriate if the defendant can show that the
16 errors substantially influenced the grand jury's decision
17 to indict.

18 I'm going to start with the clearest
19 glaring error in Count 2.

20 When you read the overt acts section of
21 Count 2, you would think that on February 15th, 2021,
22 Spivak and Smirnova contacted people to purchase USLG
23 stock and those people just happened to be working with
24 the Government.

25 It's written as if on this day, the

1 defendants sought out new co-conspirators to go commit
2 securities fraud.

3 This is completely false, and we know it's
4 false because the Government produced over 50 hours of
11:22:54 5 recorded calls and meetings, undisputed evidence. They
6 created the evidence and produced the evidence that tells
7 a different story.

8 Count --

9 THE COURT: So doesn't that decision
11:23:06 10 ultimately belong to the jury then and not to me?

11 MS. ENGELMYER: The question of whether
12 dismissal of an indictment is appropriate is an
13 appropriate question for the Court.

14 THE COURT: I understand that.

11:23:19 15 But my question is in light of all the
16 evidence you referenced that the Government provided to
17 you convincing you that there's a substantial error or
18 false reality -- however you want to characterize it --
19 that gives rise to Count 2, in light of that volume of
11:23:41 20 evidence, doesn't that shift it to being a jury question?

21 MS. ENGELMYER: I don't believe the volume
22 of evidence determines that decision.

23 The fact that there is undisputed evidence
24 here, and because it is undisputed it's a matter that's
11:23:58 25 appropriate for --

1 THE COURT: I think Mr. Abreu is going to
2 dispute the evidence.

3 MS. ENGELMYER: It's evidence that the
4 Government created and produced.

11:24:07 5 And there's no -- there may be disputes
6 about how to understand the evidence, but this is not a
7 case where you have to weigh competing testimony or, you
8 know --

9 THE COURT: And it sounds like -- and I
11:24:21 10 don't mean to skip too far ahead -- but it sounds like in
11 an entrapment sense you're arguing on an objective
12 standard, not a subjective standard, which might be fine
13 in the State of Michigan, for example, but here in
14 Federal Court we use the subjective standard.

11:24:38 15 MS. ENGELMYER: That's right.

16 The entrapment claim is based on, yes, an
17 objective standard where the -- as a matter of law, the
18 undisputed record shows that the Government induced the
19 defendants and that they were not predisposed to commit
11:24:57 20 the crime.

21 THE COURT: I guess my point is that there
22 are some jurisdictions that you examine, under an
23 objective standard, whether the defendant was entrapped,
24 and that under an objective standard would focus on the
11:25:09 25 conduct of the Government.

1 But that's not the standard under federal
2 law as in *Sorrells*.

3 MS. ENGELMYER: So I think both standards,
4 though, require an understanding of what the Government
11:25:21 5 did and whether there was a predisposition on --

6 THE COURT: Well, I think the subjective
7 standard requires predisposition.

8 And, you know, one of the questions I've
9 had, this starts to take us a little bit far afield so my
11:25:35 10 apologies for that, but on the predisposition question,
11 my understanding of federal law -- again I have some work
12 yet to do on this -- is that if you assert the defense
13 and argue it at trial, that the burden rests with the
14 Government to prove predisposition beyond a reasonable
11:25:53 15 doubt.

16 That seems kind of dicey for your client,
17 it seems to me. I mean, that seems to open the door to
18 all sorts of evidence that otherwise would not come in,
19 either strictly under the Rules or simply on a 403
11:26:09 20 analysis.

21 But if you're going to make the argument,
22 it seems like there's going to be some that comes in that
23 maybe Mr. Spivak would not like to come in.

24 MS. ENGELMYER: That's a very good point,
11:26:23 25 Your Honor, and we understand that. And these are, of

1 course, obviously issues, you know, we'll have to address
2 if this does move to a trial but --

3 THE COURT: But there's nothing that says
4 you don't make the argument now and not in front of the
5 jury.

6 I'm not suggesting you're charging forward.
7 I'm just trying to -- some of the issues I've been
8 thinking about and working through.

9 MS. ENGELMYER: Yes, Your Honor.

10 THE COURT: But I interrupted you, sorry.

11 MS. ENGELMYER: No problem.

12 Would you like me to continue on
13 entrapment?

14 THE COURT: Please.

15 MS. ENGELMYER: Or should I go back to --

16 THE COURT: Wherever you want to make your
17 argument.

18 MS. ENGELMYER: Sure.

19 So I'll just quickly go through our basis
20 for dismissal of the indictment because the grand jury
21 here was misled.

22 The indictment omits that for three months
23 prior to this February 15th, 2021 meeting, CHS and the
24 undercover agents aggressively pursued Spivak and tried
25 to get him to engage in questionable conduct.

1 It omits that in response to these repeated
2 solicitations, Spivak told the Government's agents that
3 he could only sell restricted stock from a private
4 placement at 15 cents a share and that he could not
11:27:33 5 advertise the stock.

6 Your Honor obviously has our motion papers
7 and the transcripts that we attached as exhibits. We
8 appreciate that those exhibits are long, so I actually
9 prepared a chart summarizing those exhibits to aid Your
11:27:47 10 Honor's review, if I may share with Your Honor.

11 THE COURT: Anything that aids my review,
12 I'm all in favor of.

13 Thank you.

14 MS. ENGELMYER: So, you know, there's a lot
11:28:07 15 in the recordings, and this is all in the time period,
16 the three months that precede when the Government alleges
17 the conspiracy began.

18 In short, the sting begins when CHS cold
19 called USLG on November 12th, 2020 to ask about investing
11:28:28 20 in the company. CHS was told on this and at least 15
21 other occasions that the company was selling in a
22 registered private placement at 15 cents a share and that
23 price could not change.

24 CHS devised a scheme to introduce Spivak to
11:28:44 25 undercover agents posing as wealthy investors. He

1 described these people as "big hitters" and "fixes to all
2 the problems."

3 He lured Spivak, Smirnova and their
4 3-year-old daughter to Florida on February 15th, 2021 and
11:29:00 5 his whole plan for that meeting was to convince Spivak to
6 let him promote USLG stock.

7 Spivak protested that he did not need the
8 money right away; he was just concerned about getting
9 USLG on NASDAQ as quickly as possible, and that he was
11:29:18 10 not comfortable promoting the stock until he had audited
11 financial statements.

12 After several hours of pressuring on top of
13 three months of aggressive pursuit, Spivak finally agreed
14 to let U.S. -- I'm sorry -- to let CHS market the stock
11:29:35 15 to raise the profile of the company.

16 Based on this evidence which, you know, I
17 just summarized sort of not going into detail on
18 everything, it's clear that Count 2's narrative is
19 inaccurate.

11:29:46 20 It's also critical to point out that there
21 are examples of factual allegations in Count 2 that are
22 just wrong. They are directly contradicted by the
23 recordings.

24 First, I'd like to direct Your Honor to
11:30:00 25 Paragraph 46-a of Count 2, which alleges that on February

1 15th, 2021, Spivak solicited undercover agents to
2 purchase stock.

3 But it was just the opposite. That's
4 exactly what the recordings show. Spivak solicited no
11:30:19 5 one, and it was the undercover agents that repeatedly
6 asked Spivak if they could buy stock.

7 Second, Count 2 alleges at Paragraph 46-c
8 that on March 10th, 2021, Spivak agreed to have Scott and
9 Church sell shares to an undercover federal agent for
11:30:40 10 25,000 each as a test.

11 It alleges that Spivak stated, after the
12 test transactions, they would negotiate the sale of the
13 remaining six million held by Scott and Church.

14 This is wrong. It was the confidential
11:30:56 15 source, not Spivak, that made those statements.

16 CHS was the one that said that he had a
17 game plan to buy shares from Church and Scott as a test
18 run.

19 In response, Spivak said it would be
11:31:09 20 cheaper to just buy in the market.

21 CHS insisted that they wanted to buy these
22 shares from Church and Scott because if it worked, they
23 would buy the remaining shares.

24 The fact that CHS and not Spivak made these
11:31:24 25 statements matters. It means that Spivak did not do what

1 the Government here alleges.

2 For the same reasons, the allegations that
3 Spivak caused wire transfers from Government-controlled
4 bank accounts to Church and Scott's bank accounts is
11:31:42 5 wrong. He didn't cause anything.

6 Assuming, which we contend is a reasonable
7 assumption, that Count 2 includes the facts that were
8 presented to the grand jury, and the Government does not
9 dispute this, it's clear that the Government presented a
11:31:58 10 false reality.

11 Additionally, it's likely that the
12 Government failed to instruct the grand jury on the
13 affirmative defense of entrapment.

14 These errors satisfy the standard under
11:32:12 15 *Bank of Nova Scotia*. How could the grand jury accurately
16 assess Spivak's intent to defraud when it was told that
17 Spivak said things that the Government's agent actually
18 said, or without understanding that the Government sought
19 to coerce Spivak to commit a crime?

11:32:31 20 The prejudice here is evident.

21 I'm going to move on to our second basis
22 for dismissal, unless Your Honor has any questions before
23 I do that.

24 THE COURT: No. Go ahead.

11:32:43 25 MS. ENGELMYER: So the second basis to

1 dismiss Count 2 is entrapment.

2 A valid entrapment defense has two related
3 elements, and this is from a Sixth Circuit case *United*
4 *States versus McLernon*.

11:32:57 5 First, that the Government induced the
6 crime; and, second, that the Government lacked a
7 predisposition to engage in the criminal conduct.

8 The Sixth Circuit has held that entrapment
9 may be established as a matter of law if the undisputed
11:33:13 10 evidence demonstrates that the Government agent engaged
11 in conduct which overbears an otherwise innocent person's
12 will and thereby induces him to commit a criminal act
13 that he was not disposed to commit. And this is from
14 *United States versus Jones*, a Sixth Circuit case from
11:33:30 15 1978.

16 So the first element here, the criminal
17 design, originated with the Government. The undisputed
18 evidence in the forms of hours of recorded calls and
19 meetings demonstrates that Spivak and Smirnova were the
11:33:47 20 targets of the Government's repeated efforts over six
21 months to create a crime.

22 As discussed, the agents tried to get
23 Spivak to sell outside of the registered placement. The
24 Government devised the scheme to promote USLG stock, and
11:34:02 25 worked hard for months to convince Spivak over his

1 repeated objections.

2 Finally, it was the Government, not Spivak,
3 that came up with the plan to buy free-trading stock from
4 Church and Scott.

11:34:15 5 Moving on to the second element, the
6 undisputed evidence shows that Spivak and Smirnova were
7 not predisposed to commit a crime.

8 The Sixth Circuit generally considers a
9 number of factors. This is also from *United States*
11:34:30 10 *versus McLernon*. They are the character and reputation
11 of the defendant, including any prior criminal record;
12 whether the suggestion of criminal activity was initially
13 made by the Government; whether the defendant was engaged
14 in criminal activity for profit; and whether the
11:34:46 15 defendant evidenced reluctance to commit the crime.

16 All of these favors weigh -- all of these
17 factors weigh in favor of the defendants.

18 First, Spivak and Smirnova have no criminal
19 history. Not only that, but Spivak was investigated by
11:35:02 20 the SEC for this very conduct, and the SEC declined to
21 bring an enforcement action against him.

22 Second, as discussed above with respect to
23 the first element, the suggestion of criminal activity
24 was entirely made by the Government.

11:35:16 25 Third, there is no evidence that Spivak

1 personally profited from any sale of USLG -- USLG
2 securities.

3 The indictment never alleges that Spivak
4 sold any of his USLG stock, and as my colleague pointed
11:35:33 5 out that's because he had over 50 million shares of stock
6 and only sold a small portion.

7 Spivak and Smirnova's goal was always to
8 grow the company, its product line, and shareholder
9 value.

11:35:47 10 This is supported by the fact that Spivak
11 and Smirnova poured their money into the company to keep
12 it afloat. Spivak guaranteed all of the company's loans.
13 And he deferred his salary during the time of the alleged
14 conspiracy.

11:36:02 15 Clearly any dump would only hurt Spivak and
16 Smirnova.

17 Fourth, as discussed, Spivak and Smirnova
18 repeatedly evidenced a reluctance to commit any crime.
19 In addition to the examples I've --

11:36:17 20 THE COURT: I guess -- I guess the rub on
21 this one is that, I mean, every entrapment case I've read
22 has that exact same fact pattern where there's an initial
23 reluctance and eventually the defendant gives in.

24 And whether -- whether that turning point
11:36:36 25 suffices under the law, isn't that for the jury here?

1 I mean, a jury might well agree with you
2 that this was all the idea of the Government and they put
3 him up to it, and had they not done this, none of this
4 would have happened.

11:36:54 5 They might well agree with that. But a
6 jury might say these were the halfhearted protestations
7 of someone who was saying and doing the right things
8 until he didn't.

9 MS. ENGELMYER: We appreciate that
11:37:12 10 entrapment is a complicated affirmative defense and often
11 it is a jury question.

12 But the Sixth Circuit has clearly held that
13 it can be established as a matter of law where the
14 undisputed evidence shows inducement and no
11:37:29 15 predisposition.

16 And --

17 THE COURT: Is that more appropriate on
18 Rule 29?

19 I'm still working, I haven't had a chance
11:37:39 20 to read all these cases yet, but, I mean, it seems to me
21 that that's probably the procedural posture in which the
22 issues arise or go up.

23 I could be wrong. I haven't read all these
24 cases yet.

11:37:52 25 MS. ENGELMYER: I would have to look into a

1 little bit more closely the exact procedural posture of
2 all of these decisions, but the Sixth Circuit case that's
3 very helpful here, *United States versus Jones*, clearly
4 says that it's the duty of the Trial Judge to determine
11:38:10 5 whether the evidence is in dispute or whether the
6 question can be resolved as a matter of law.

7 So we think that's appropriately a question
8 for Your Honor.

9 And --

11:38:21 10 THE COURT: I agree with that.

11 I guess that becomes a question of timing,
12 whether it's on Rule 29 where we have the evidence and
13 the Government has rested, or we're sitting here reading
14 an indictment as it were.

11:38:35 15 MS. ENGELMYER: Right.

16 We understand. We submit this is really a
17 unique scenario, which is that the Government created and
18 produced 50-plus hours of recording which they can't
19 dispute the credibility of that evidence. It's their
11:38:54 20 evidence.

21 So in this situation, that is undisputed
22 evidence that Your Honor can consider whether this is one
23 of those unique cases where entrapment can be established
24 as a matter of law.

11:39:11 25 You know, in this --

1 THE COURT: No, go ahead.

2 MS. ENGELMYER: I was just going to say,
3 you know, three months of pursuit and coercion, which is
4 all evidence that we can fairly assume was not presented
11:39:38 5 to the grand jury, is critical.

6 And, you know, in sum, the evidence shows
7 that the Government sought to entrap these defendants and
8 Count 2 can and should be dismissed on this basis.

9 Third and finally, Count 2 should be
11:39:57 10 dismissed on the independent basis that it fails to state
11 a claim against Spivak and Smirnova for conspiracy to
12 commit securities fraud.

13 I'll note that the Government failed
14 entirely to respond to this argument in its opposition
11:40:13 15 brief, likely because even post-indictment, the
16 Government has not found a theory of securities fraud
17 that is supported by admissible evidence.

18 One would think that if there was a crime,
19 it would be somewhere in the 50-plus hours of recorded
11:40:29 20 calls and meetings. It's not there.

21 Count 2 recites the elements of securities
22 fraud as it does in Count 1, but it never cogently says
23 what illegal conduct the defendants conspired to commit.

24 My colleague went through this extensively
11:40:47 25 in Count 1, but, you know, the allegations are similar in

1 Count 2.

2 Count 2 alleges that Spivak and Smirnova
3 solicited would-be promoters to purchase free-trading
4 shares. As discussed, that's just not true.

11:41:03 5 But even if it were true, it's not fraud to
6 promote your company's stock. There's no evidence that
7 Spivak or Smirnova intended to make false statements,
8 that they did, or that they intended to mislead
9 investors.

11:41:17 10 Count 2 alleges that Spivak and others
11 arranged to artificially inflate the price of USLG shares
12 by creating and releasing favorable press releases. As
13 Mr. Axelrod said, you know, extensively favorable press
14 releases are not illegal.

11:41:33 15 There is not a single allegation, despite
16 hours of recorded calls and meetings, that Spivak
17 discussed publishing false press releases, false
18 marketing material. There is just no evidence.

19 The securities and wire fraud counts
11:41:51 20 associated with Count 2 also fail to state a claim.

21 I think those arguments are fairly simple
22 and straightforward in our motion, so I was not going to
23 go through those, but I'm happy to if Your Honor would
24 like.

11:42:00 25 THE COURT: All right. No, I think I've

1 got my questions on the table, so unless there's anything
2 further on the defense side, Mr. Abreu, happy to have you
3 speak to Count 2.

4 MS. ENGELMYER: Thank you, Your Honor.

11:42:12 5 THE COURT: Thank you.

6 MR. ABREU: Thank you, Your Honor.

7 Well, I guess addressing first the point
8 that we didn't respond to, the fact that Count 2, their
9 claim that Count 2 is not a claim, it's the same argument
10 that they made in Count 1. I don't think it's necessary
11 to repeat arguments per count.

12 It is a crime to -- you can commit -- you
13 can take legal acts to commit a crime, right? You can
14 mail a piece of paper, that is not illegal. If you're
11:42:55 15 doing it with illegal intent to defraud somebody, to
16 commit a crime, it is a crime.

17 So it doesn't matter that they were -- that
18 the press releases were favorable or that they were even
19 true. If they were released with the intent to defraud
11:43:12 20 and as part of the scheme, then they're relevant to the
21 crime that's at issue.

22 Your Honor, I think to your point on the
23 entrapment issue, one, obviously I'll dispute until I'm
24 blue in the face that there was any entrapment because
11:43:27 25 the Government does dispute the evidence or at least the

1 defense's interpretation of the evidence.

2 Do we dispute that 50 hours of recording
3 exists? No. Do we dispute what those recordings mean or
4 what the defendant really means when he says certain
11:43:45 5 things in those recordings? Absolutely.

6 And that's a matter for the jury.

7 But if after the Government's case the
8 defense makes a Rule 29 motion and the Court finds that,
9 you know, no reasonable juror could make that
11:43:59 10 determination based on the evidence that was admitted at
11 trial, then Your Honor dismisses the count.

12 That's the correct procedural posture for
13 this, because as is evident with all of these motions to
14 dismiss, this is about evidence, a dispute about evidence
11:44:21 15 and, you know, that the Government didn't precisely lay
16 out exactly what Mr. Spivak did to violate the law, when
17 in fact it has pled sufficiently -- and with a lot more
18 detail than it usually does -- what the violation was
19 here.

11:44:38 20 In terms of the defense's argument that the
21 Government's misrepresenting the facts, Your Honor, it's
22 simply not true. We dispute that as well.

23 But again, I wasn't going to spend a lot of
24 time in a brief arguing facts because this isn't the
11:45:02 25 proper vehicle to do it, and Your Honor should not be put

1 in the position of listening to 50 hours of phone calls
2 to determine who's right about what a particular call
3 means and whether Mr. Spivak was predisposed.

4 If, looking at the indictment in the manner
11:45:22 5 most favorable to the Government at this stage, that the
6 allegations were accepted as true as they are, and we've
7 alleged Count 1 as securities fraud occurring before this
8 period in 2020, that Mr. Spivak committed securities
9 fraud before 2020, then he's predisposed.

11:45:41 10 There is no real issue as to entrapment
11 relative to this 2020 time frame.

12 THE COURT: I think one of the concerns,
13 excuse me, I hear from the defense goes back to an issue
14 I asked when we were talking about Count 1, which is
11:46:05 15 cherry-picking of evidence and so on.

16 If things are taken out of context or the
17 like, you can make -- I think in this election year of
18 all years we know that that lies in our future, but I
19 think we all understand the point, and I think the
11:46:23 20 concern is that that might have gone on or had some
21 bearing on what the grand jury returned.

22 And so, I mean, I take the point about what
23 is for a jury, what's for Rule 29, but I think here on a
24 motion to dismiss the question is probably more
11:46:41 25 front-loaded and focused on the integrity of those

1 proceedings.

2 MR. ABREU: Your Honor, again the
3 defendants haven't met the bar of establishing that there
4 was irregularity in the grand jury.

11:46:54 5 This isn't reason to believe that there's
6 irregularity in the grand jury because the law does not
7 require that the Government present the entire picture.

8 And I'm not saying that we didn't, but
9 there is no requirement that we do that. There's no
11:47:09 10 requirement that we present the grand jury with every
11 self-serving exculpatory statement that a defendant
12 makes.

13 That's simply not the law.

14 And obviously, there is a mechanism where,
11:47:24 15 you know, in particular cases where if Judges are
16 concerned about what the grand jury considered, that the
17 Judge could look at the transcripts in camera.

18 But, Your Honor, I'd submit that here, this
19 is literally throwing everything against the wall to see
11:47:41 20 what sticks. And none of it sticks because a lot of it
21 just is about the evidence and it doesn't really make
22 sense from a legal perspective that, you know, Mr. Spivak
23 was entrapped or that they were simply misled because of
24 the overt acts that the Government chose to include, by
11:48:02 25 starting the conspiracy date on the date that he agreed,

1 first made the open agreement, the most clear agreement
2 to commit a criminal act.

3 That it started on that date, and that the
4 overt acts that support that allegation in Count 2 are
11:48:24 5 listed from that date forward does not automatically mean
6 that the grand jury is -- has been tampered with or
7 hasn't received the correct legal instruction because,
8 you know, it's obvious that the Government was trying to
9 hoodwink the grand jury to indict Mr. Spivak.

11:48:43 10 Again, that's just throwing things against
11 the wall without any proof.

12 And --

13 THE COURT: Let me make sure I understand
14 your predisposition argument as well.

11:48:51 15 Is your argument that because of the
16 different time periods charged in Count 1 versus Count 2,
17 that Count 2 comes later, so the predisposition arises
18 from the fact of the earlier acts of securities fraud?

19 MR. ABREU: Your Honor, I think that's one
11:49:08 20 way to get over that, that bar, or at least one way to
21 show the Court in the legal sense, if accepting the facts
22 of Count 1 as true, then Mr. Spivak is predisposed
23 because he committed securities fraud months before
24 Count 2.

11:49:30 25 And if he's taking that action in Count 1,

1 one could infer why the Government approached Mr. Spivak
2 as part of an undercover operation, because of that
3 conduct.

4 Now, I think the defense's response was
11:49:50 5 "The SEC cleared us." Well, that's not what the SEC did.
6 They didn't decide to charge you.

7 I can't speak for the SEC. They are on the
8 civil side. I'm on the criminal side. And whatever the
9 SEC decided to do, they decided to do.

11:50:06 10 But I think if Your Honor looked at the
11 letter that they sent to Mr. Spivak, they particularly
12 disclaimed any -- making any judgment about whether he
13 committed any kind of violation of law or not.

14 THE COURT: It is a little unusual to see
11:50:21 15 the sequencing between the DOJ and the SEC in this case.
16 Usually you see it go the other way, where on the
17 criminal side you might say, "We're not going to pursue
18 criminal charges because of the proof beyond a reasonable
19 doubt standard, but that certainly leaves you open to
11:50:38 20 civil claims under a lower standard."

21 And here, the SEC exercising its
22 discretion, for whatever reason, not to move forward, I'm
23 not saying it's dispositive or anything, but it does
24 raise an eyebrow.

11:50:54 25 MR. ABREU: Well, Your Honor, I can tell

1 you the very simple answer is that the two sides of the
2 house have two very different toolsets and no -- and
3 sometimes do not do parallel investigations.

4 This was not a parallel investigation, and
11:51:08 5 the SEC didn't have access to the information that the
6 United States from DOJ on the criminal side had.

7 Had they, they may have made a different
8 decision. I don't know.

9 But we obviously can't share grand jury
11:51:20 10 materials with the SEC, and the SEC doesn't have the same
11 tools that we do. And so different decisions were made.

12 Often there are parallel investigations,
13 and then you see some kind of coordinated action. But,
14 yeah, this one is a little unusual in that.

11:51:40 15 THE COURT: I mean, it's not unprecedented.
16 It's not a unicorn as far as I can tell. It just raises
17 an eyebrow.

18 Returning to predisposition then, I suppose
19 if a jury were to acquit on Count 1, your predisposition
11:51:54 20 argument on Count 2 becomes a little bit harder in the
21 face of an entrapment argument made to the jury.

22 MR. ABREU: It would be if Your Honor
23 rejected all of the arguments relative to what's in the
24 actual recordings themselves pre-dating that February,
11:52:07 25 2021 date where Mr. Spivak talks about what they did

1 before with the other people.

2 I think there's one call that's provided in
3 one of the exhibits where Mr. Spivak actually described
4 Mr. Mallion as, "If you would put Chris Farley in Wolf of
11:52:31 5 Wall Street, you would have the guy that took us public
6 and we made every single mistake along the way. I know
7 now not what to do."

8 An admission of exactly what they did,
9 dated -- and I believe that that happens, yeah, November
11:52:50 10 of 2020.

11 There's evidence in those calls, but again
12 not the appropriate time to lay all of that out and, you
13 know, ask the Court to make factual determinations that
14 should be the province of the jury.

11:53:13 15 But, yes, if we -- if the jury were to
16 acquit on Count 1, and there was no other evidence of
17 predisposition and they, the defense, raised this
18 argument of entrapment and no other evidence was
19 submitted, then, sure, I think it would be a harder bar
11:53:30 20 for the Government to meet.

21 THE COURT: All right. Thank you.

22 MR. ABREU: Thank you, Judge.

23 THE COURT: So there's motions to sever.

24 They're variously called motions to bifurcate, sever,
11:53:46 25 various other things as well, so I'm happy to hear -- I

1 do have some questions on this one as well.

2 Happy to hear from whoever wants to speak.

3 MR. AXELROD: Your Honor, there was one
4 other motion to dismiss with respect to Counts 48 and 50.

11:53:59 5 THE COURT: You are correct, and actually
6 Mr. Bongiorno had one on pre-indictment delay so I'm
7 getting ahead of myself here.

8 So my apologies.

9 So let's take up the last two motions to
11:54:08 10 dismiss.

11 MR. AXELROD: Yes. And I'll be very quick
12 on this.

13 We filed a motion to dismiss Counts 48 and
14 50.

11:54:14 15 48 charges a conspiracy to witness tamper
16 through intimidation, corruption, threatening. There's
17 nothing in there.

18 Essentially what the Government is trying
19 to do is criminalize the right to defend oneself by
11:54:27 20 finding witnesses to go talk to the FBI. If you actually
21 look at the indictment itself, it says "Find this person
22 and tell them go talk to the FBI," and that's charged as
23 a conspiracy to witness tamper, which I will get to in a
24 second, but I find that I don't know how a grand jury
11:54:42 25 returned an indictment on that.

1 Of course, the Government did not even
2 respond to our motion to dismiss Count 48 which is
3 waiver. I don't know of any rule that would allow the
4 Court to treat the Government as a preferential party,
5 but I know that in a civil case, if a party did not
6 respond to a motion, the substantive motion, a
7 dispositive motion, that motion would probably be
8 granted.

9 Count 50 --

10 THE COURT: Maybe we should change that
11 rule to cut down on the length of briefs, but that's
12 different, different musings.

13 MR. AXELROD: Fair enough.

14 That's Count 50, very similarly, they
15 charge Mr. Spivak with obstruction of justice in
16 connection with an investigation based on the fact that
17 Pretrial Services was going to go search his house for
18 weapons.

19 That's not an investigation. That's a
20 Pretrial Services check review, but the Government paints
21 that as part of an FBI investigation. It's simply not
22 true.

23 And I don't know how also that that got
24 charged, but again the Government didn't respond, so we
25 rest on our papers on those.

1 THE COURT: All right. Thank you.

2 Did you wish to speak to those issues,

3 Mr. Abreu?

4 MR. ABREU: Yes, Your Honor.

11:55:50 5 The United States, well, my contention is I
6 did respond to those motions as in our response.

7 THE COURT: I'll tell you, I'll be very up
8 front with you, I haven't gotten to these counts in my
9 prep work so I don't know if you have or haven't. I have
11:56:10 10 no view on that one way or the other.

11 What I do recall is the proceedings we had
12 at the beginning -- well, maybe at 2:00 o'clock in the
13 case, maybe not at the very beginning, but shortly after
14 the beginning of the case.

11:56:22 15 As I recall, there were some issues with
16 rats and alleged witness intimidation, and Mr. Spivak's
17 counsel was really desiring to make a record on that, and
18 we never got to that for various reasons.

19 MR. ABREU: Yes, Your Honor.

11:56:38 20 And I'll -- the thumbnail sketch is that
21 the Government's response does not address the factual
22 disputes that the defendant makes.

23 The Government's response lays out what is
24 required under the law to allege a crime in Count 1,
11:57:01 25 Count 2, and all the conspiracy counts, Count 1, Count 2,

1 Count 48; two or more persons conspired to commit -- to
2 commit an enumerated crime in Section 1512, and that the
3 defendant knowingly and voluntarily joined that
4 conspiracy.

11:57:17 5 The allegations are made. The manner and
6 means are provided in the indictment. The overt acts
7 taken or the acts in furtherance -- I forget how they are
8 styled -- are laid out, that the defendants believed that
9 that is a legal act.

11:57:32 10 The other way to say that is my defendant
11 didn't have -- or my client didn't have the specific
12 intent to commit a crime.

13 That's a factual issue. If I don't prove
14 intent or that he had corrupt intent when he was telling
11:57:47 15 people to put his daughter on the witness's lap to make
16 him feel bad so that he would change his story or talk to
17 the FBI, if that wasn't corrupt, and if the jury doesn't
18 agree with me, then I lose, if there's no other evidence
19 that I present.

11:58:03 20 I believe that that was corrupt.

21 In terms of the obstruction of federal
22 investigation, again, Your Honor, the United States
23 alleged what it alleged. It is sufficient.

24 I didn't want to get into an argument with
11:58:17 25 the defense over what the investigation was, but there

1 was just a search warrant at Mr. Spivak's office.
2 Mr. Spivak is concerned with computers that have evidence
3 from the Mallion days being discovered in his house.

4 The search for the guns was a consent
11:58:38 5 search that related back to his detention hearing, but at
6 the time the Government was negotiating with former
7 counsel to obtain all the computers and guns in the
8 house. And eventually, that was whittled down to the
9 firearms in the house, and that was what the consent was
11:58:59 10 provided for.

11 That's not what Mr. Spivak was aware of
12 when he made that call.

13 So what's the investigation? The
14 investigation of the securities fraud. There was a
11:59:09 15 complaint. He hadn't even been indicted yet. That's why
16 I wasn't going to get into a factual dispute about
17 whether there was an investigation or not. That's for
18 the Government to prove.

19 If the Government can't prove it, then the
11:59:21 20 Court will Rule 29 it after we rest, and the defendant
21 will be happy.

22 That's all I have, Your Honor.

23 THE COURT: All right. Thank you.

24 And again, my apologies, Mr. Rosen,
11:59:40 25 regarding the -- I'll call it a pre-indictment delay

1 motion, which I have read. I've been through those
2 papers.

3 MR. ROSEN: Well, I'm going to
4 short-circuit a little bit of this, Judge, because there
11:59:54 5 are certain acknowledgements I'm going to make that will,
6 I think, cut through a lot of the arguments.

7 It is an unconstitutional pre-indictment
8 delay motion to dismiss, Your Honor, alleging abuse of
9 process and unfair -- the Government's unfair advantage
12:00:10 10 it obtained by way of its conduct in this case.

11 That said, we will acknowledge that this
12 was an effort to cooperate with the Government, and we
13 will acknowledge that this was done at Mr. Bongiorno's
14 request and the Government's open acceptance of that.

12:00:30 15 We acknowledge that Mr. Bongiorno signed
16 these waivers.

17 All of that was done with the belief that
18 the Government was acting in good faith, which it may
19 have been at the time. But what turned this upside down,
12:00:47 20 Judge, in my opinion is a couple of events.

21 One, the nature and the timing of
22 Mr. Bongiorno's arrest. After a year-and-a-half of what
23 I thought were good faith meetings, to have
24 Mr. Bongiorno -- I'm going to segregate, of course, our
12:01:11 25 motion on the argument to suppress from this -- but to

1 have Mr. Bongiorno arrested -- back up.

2 Early on in our conversations with the
3 Government, they asked for me to obtain Mr. Bongiorno's
4 passport during the course of our negotiations. And I
12:01:26 5 accepted that and I have it. So the Government was fully
6 aware that Mr. Bongiorno could not and was not going
7 anywhere.

8 The fact that they chose to arrest him on a
9 Friday afternoon at an airport with his wife and infant
12:01:38 10 child in the Virgin Islands, U.S. territory, knowing that
11 he was going to then spend the weekend in a local jail --
12 which turned out to be quite an event in his life -- when
13 all they had to do, after all these communications we've
14 had, was pick up the phone and say, "Listen, we've had
12:01:58 15 enough, we're indicting your client, bring him in Monday
16 morning." Okay.

17 That triggered concern on my part as to
18 what had been happening all along. We do know that
19 witnesses had been contacted, which I guess is the
12:02:14 20 Government's privilege, but in the course of that, the
21 nature and the conduct of the communications I've heard
22 evidenced to me that this was now becoming a "Let's get
23 as much information as we can from the defendant," the
24 putative defendant.

12:02:34 25 As the Court just commented, the oddity of

1 the SEC long-term investigation -- and Your Honor, I
2 think, appropriately asked all the parties early on "You
3 okay with the same Judge taking both matters," and it was
4 appreciated -- and we were -- that there were issues that
12:02:56 5 had come up in the nature of these communications, very
6 aggressive in the Government's contact of defense
7 witnesses.

8 You know, Judge, the Government's position
9 on this case and the law is that we need to show specific
12:03:14 10 prejudice. That's the law. And I will concede that my
11 motion has not risen to that level. We haven't.

12 But that's the reason I've asked for an
13 evidentiary hearing, because I think we can establish
14 that how the Government proceeded, what the Government
12:03:33 15 was doing in the course of these 18 months of
16 negotiations with Mr. Bongiorno, producing the witnesses
17 that the Government has contacted, calling the agents to
18 find out what was really going on, that's how prejudice
19 is established.

12:03:48 20 And there's no way I can do that without
21 that hearing.

22 So we believe that while the language in
23 the waivers speak to, well, you're not going to challenge
24 this, underlying all of that is always the Government's
12:04:07 25 acting in good faith.

1 If they were, and it's established from the
2 witness stand, fine.

3 If they weren't, that's how we are able to
4 establish the prejudice.

12:04:18 5 And I think that we have at least risen to
6 the level of allowing the Court to have a hearing on how
7 the Government was conducting these -- this inquiry, why
8 it chose to arrest, and how it chose to arrest at that
9 moment.

12:04:36 10 You know, Mr. Abreu and I have had many
11 pleasant conversations. I'm not a believer of repeating
12 to any court those conversations. I don't think that's
13 the appropriate way to handle these matters.

14 But to say that I was taken aback by the
12:04:52 15 arrest would be an understatement, perhaps because I
16 was -- had a knee replacement the day before the arrest.
17 It was a busy day for me the next day.

18 So that being said, Judge, I think we have
19 at least risen to the level of being able to have the
12:05:09 20 Court conduct a hearing and to find out what was really
21 going on during the course of 18 months of negotiations
22 with Mr. Bongiorno.

23 THE COURT: I guess I'm not sure how a
24 hearing would show prejudice, to analogize to the
12:05:24 25 discussion I was having with Ms. Engelmyer about the

1 entrapment issue.

2 It might establish some, from your
3 perspective, less than good faith or bad faith conduct on
4 the part of the Government or so forth, but I'm not sure
12:05:42 5 how that rises to the level of prejudice of the defense,
6 which is what I understand the case law in this area to
7 talk about.

8 I think if the Government were out there,
9 hypothetically, murdering witnesses who were going to
12:05:56 10 testify on your client's behalf, that would be one thing.
11 But I don't think there's any suggestion that anything so
12 shocking would be going on.

13 But I think prejudice has to go to a
14 specific right. Presumably here it's the right to a fair
12:06:12 15 trial as protected under the Sixth Amendment and Article
16 3.

17 So I'm just not sure what, what specific
18 evidence an evidentiary hearing might develop.

19 MR. ROSEN: Well, so, if it's an
12:06:27 20 unconstitutional delay that the Government was extending
21 the course of these meetings, these discussions, and of
22 course it's -- pardon the nature of my comment -- but
23 then it's sucking more information out of Bongiorno for a
24 purpose that wasn't as expressed.

12:06:51 25 It wasn't "Let's find a resolution to this

1 case that both parties can agree on," and if it was to be
2 able to contact defense witnesses that they may not have
3 known about, that becomes a question of prejudice,
4 becomes a question of good faith or bad faith, it becomes
12:07:10 5 a question of the Government's intentions.

6 I can't do that unless I've got an agent on
7 the stand to ask those questions.

8 If I got the answers that in my view would
9 be acknowledging that we were not just trying to settle
12:07:29 10 this case, but we were interested in being able to talk
11 to the witnesses in an aggressive fashion and a very
12 tainted fashion, Government murder, if you will, by
13 verbosity, it's like, you know, are you aware that this
14 man was doing this, this, this and that.

12:07:50 15 So that's how prejudice is established.

16 It isn't -- like I said, I acknowledge the
17 motion did not get to that place because it really
18 couldn't, but I think if we had that hearing and
19 established that there was not good faith, at some
12:08:08 20 point -- it may have started in good faith.

21 But, you know, Judge, I will -- I have the
22 page written down, but the Government indicated in its
23 response, "We determined Bongiorno was lying."

24 Well, then what are we doing? Why are we
12:08:26 25 bringing him back to resolve the case if you don't

1 believe what he's saying?

2 My history with that is, "Rosen, you're
3 client's lying, get him out of here and don't come back,
4 you know, we'll see you in court."

12:08:40 5 But 18 months' worth of debriefings and
6 conversations raises a question of what were they doing,
7 when did it turn, why were they continuing to get
8 information from Mr. Bongiorno?

9 And again, I don't think the Court can just
12:08:53 10 ignore this arrest. It was, in my view, an exercise of
11 very bad faith by the Government. All they had to do was
12 call me.

13 So that tip of the iceberg causes me to say
14 there's more here that we need to look at.

12:09:11 15 THE COURT: All right. Thank you.

16 MR. ROSEN: Yes, sir.

17 THE COURT: Mr. Abreu.

18 MR. ABREU: Your Honor, I have to breathe
19 after reading this motion and listening to that argument
12:09:27 20 because this might be the most offensive motion I've
21 received from a defense attorney relative to, like he
22 said, 18 months of working with him and his defendant,
23 his client, to resolve the case, offering him plea
24 agreements, multiple times, allowing him the opportunity
12:09:49 25 to meet with my management to -- for declination

1 presentations, sitting through a 45-minute declination
2 video that they created, and then be accused of acting in
3 bad faith because his client decided to go to a U.S.
4 territory, which pops up on CBP's radar, and if there's
5 an active warrant because there was an indictment issued,
6 they arrested him.

7 Did I tell them to arrest him? No. Does
8 it matter? No.

9 You know, is it -- it's not great that he
10 was arrested on a Friday and had to hang out in the one
11 prison or the one jail in the Virgin Islands, but guess
12 what? It happens to defendants every day. This isn't
13 personal against Mr. Bongiorno.

14 And Mr. Rosen's argument that, you know,
15 he's not going to talk to the Court about lawyer
16 conversations, and then file a motion saying, "I want
17 return of property, which I know isn't properly venued
18 here but Mr. Abreu said it's okay; I just want my cake, I
19 want to eat it, too; everybody did something wrong to me
20 because I wouldn't plead guilty." You were offered a
21 plea.

22 He was offered a plea agreement. He
23 declined it. He was told he was going to be charged. He
24 was charged, period.

12:11:08 25 No evidentiary hearing is needed. This is,

1 again, this is an unwarranted motion that has no basis
2 and should be denied.

3 Thank you, Judge.

4 THE COURT: All right.

12:11:27 5 MR. ABREU: I don't know if you have any
6 questions.

7 THE COURT: No.

8 All I was going to say, I guess two things.

9 One, since you had made the cake and eat it
12:11:35 10 too, everyone likes cake so I can't blame them, I
11 suppose, in that regard.

12 But beyond that, I was going to say if it
13 helps you take a breath, you should see what comes across
14 my desk.

12:11:46 15 MR. ABREU: I'm sure, Your Honor.

16 THE COURT: Not in this case, don't get me
17 wrong.

18 MR. ABREU: No, I appreciate that, Judge.

19 THE COURT: All right. So with that, then,
12:11:54 20 we can move on to the motions to sever.

21 Again, these are various -- these are
22 called different things by different people.

23 On this one, Mr. DeVillers, I believe you
24 filed the first one, so happy to hear from you first.

12:12:09 25 MR. DEVILLERS: So, Your Honor, just to be

1 clear, we don't really see any reason to sever out of the
2 case as defendant other than the statements, and this is
3 what we're concerned about.

4 There are clearly about 30 hours of tapes
12:12:29 5 and text messages and even the statements in the
6 indictment, my client had nothing to do with. He wasn't
7 part of these. He wasn't there for them. He wasn't
8 talking to them.

9 So the question is, you know, is
12:12:41 10 this -- the argument really is that it was not hearsay or
11 it's an exception because it's a statement of a
12 co-conspirator in furtherance of a conspiracy.

13 THE COURT: I mean, I've read the
14 statements so I understand your argument, and that's
12:12:56 15 fundamentally my question.

16 You, even if you had separate trials, you
17 know, we can talk about that, but, you know, for present
18 purposes we can say we'll try your client first or
19 second, I'm not sure it really matters, don't the
12:13:12 20 statements still come in?

21 MR. DeVILLERS: I don't believe they do.

22 One, they have to show that there was a
23 conspiracy by a preponderance of the evidence to show
24 that they would come in.

12:13:21 25 THE COURT: I mean, that would be a Rule

1 104 issue, I suppose.

2 MR. DEVILLERS: We could, and that's, quite
3 frankly, I may be expecting some sort of a voir dire or
4 hearing to establish by a preponderance of the evidence
12:13:32 5 that a conspiracy exists.

6 If we just went into it through a trial, I
7 can't imagine -- you know, Mr. Abreu is a fine
8 attorney -- but doing an opening statement without
9 actually discussing these statements that my client
12:13:44 10 wasn't a part of.

11 It's not also that there were
12 co-conspirators' statements. They have to be in
13 furtherance of the conspiracy. And there are a lot of
14 statements that are both in the indictment and there's
12:13:55 15 text messages and --

16 THE COURT: I don't think they have to be
17 in statements that your client makes in furtherance of a
18 conspiracy.

19 I think the declarant just needs to make
12:14:07 20 the statement in furtherance of a conspiracy.

21 So under the conditional relevance, the
22 question would be whether Mr. Spivak making the
23 statements -- I believe he made most of the ones in your
24 exhibit that I've reviewed -- if those were statements
12:14:20 25 that were in furtherance of the conspiracy, you know,

1 that I think they would, you know, ultimately I guess I
2 just, you know, even if we were to sever or bifurcate,
3 try separately under whatever nomenclature, aren't many
4 of those statements coming in anyway?

12:14:40 5 MR. DeVILLERS: I think if you found there
6 was a conspiracy by a preponderance, yes, some would.

7 But there are some even in our motion, I
8 mean there are statements by Mr. Dean, he's certainly not
9 talking in furtherance of the conspiracy, and he's
12:14:51 10 talking about my client and he's making incriminating
11 statements about my client kind of self-serving to some
12 extent that may come in in a trial just with Mr. Spivak
13 to give context to a conversation that wouldn't come in
14 against my client as a furtherance of the conspiracy.

12:15:05 15 So I suppose what, you know, we could -- I
16 agree that it is unlikely these are testimonial
17 statements and that there's a confrontation clause issue,
18 it really purely is an evidentiary issue.

19 And I suppose I can object, but it seems to
12:15:22 20 me that I'll be objecting through opening statements,
21 even if the Court were to find that there was -- there
22 was a preponderance of the evidence suggesting a
23 conspiracy, but there's a lot of these statements that I
24 don't agree that are furthering the conspiracy.

12:15:36 25 And that's what I'd be objecting to the

1 point where I'm not sure that we could have, you know, a
2 trial that's not going to be very, very interrupted.

3 THE COURT: All right. Thank you.

4 I think I understand your arguments and
12:15:52 5 your position.

6 Bear with me one second.

7 You can have a seat, but bear with me
8 before I turn to a co-defendant.

9 All right. Thank you. And thanks for
12:16:16 10 bearing with me for that moment.

11 I'm pretty sure everyone has filed one of
12 these motions, so I'm not sure who wants to speak next.

13 MS. KELLY: We will, Your Honor.

14 THE COURT: All right. You drew the short
12:16:29 15 straw. Everyone was looking at you.

16 MS. KELLY: Your Honor, my name's Melissa
17 Kelly and I'm with the firm of Tucker Ellis, and along
18 with Mr. McCaffrey I represent Olga Smirnova.

19 I'm talking to you today about the motion
12:16:54 20 to bifurcate Counts 1 and 2 from trial with Counts 48
21 through 50.

22 You know, the standard for that relief
23 is -- it's in our briefing and I'm sure the Court is
24 familiar with it, as is everyone in this room -- and it's
12:17:08 25 about preventing prejudice, specifically the compromise

1 of a specific trial right or preventing the jury from
2 making a reliable determination as to guilt or innocence.

3 And the danger that's at the heart of our
4 arguments in this motion is spillover evidence which is,
12:17:25 5 you know, the danger that evidence about one count or one
6 set of counts will cause the jury to make an unreliable
7 determination about guilt with respect to the other
8 counts.

9 And here that danger is particularly keen
12:17:39 10 because Ms. Smirnova is charged in the first two counts,
11 the first two conspiracy counts, and her conduct is
12 referenced in Counts 48 through 50, but she's not charged
13 in those counts.

14 And, you know, as you've heard a few people
12:17:52 15 talk about today, the evidence or, excuse me, the
16 allegations in Counts 1 and 2 about Ms. Smirnova are
17 thin. They're thin at best. Mr. McCaffrey talked about
18 that with respect to Count 1.

19 You can read through Count 2 and see that
12:18:05 20 it relies on a series of recorded meetings that
21 Ms. Smirnova was at, you know, three of them; she was
22 there with her daughter. She was tending to her
23 daughter.

24 That's all covered in the briefing, and I
12:18:16 25 know that the Government said a few moments ago that

1 there's a lot, you know, more evidence with respect to
2 the text messages that form the basis for Count 1, but
3 that doesn't necessarily weaken or affect our argument.

4 Our argument still holds because the three
12:18:35 5 final counts invite the jury to conclude that
6 Ms. Smirnova engaged in illegal conduct, and that's
7 particularly precarious for her in this case because
8 Count 48 is a conspiracy count against her husband Paul
9 Spivak.

10 And in Paragraph 56, Page 40 of the
11 indictment, the Government alleges that Mr. Spivak
12 conspired to obstruct justice -- obstruct justice,
13 excuse me, with unnamed conspirators, and then it's
14 followed by a discussion of Ms. Smirnova's conduct.

12:19:09 15 And I found it sort of interesting a few
16 moments ago, the Government actually referred to Counts 1
17 and 2 and 48 in the same breath, the conspiracy counts.
18 So I think that demonstrates the sort of, you know, risk
19 that we are talking about here, and that is that --

12:19:24 20 THE COURT: Why would a jury instruction
21 not suffice to protect the interests of your client in
22 this regard?

23 I mean, I think that's normally how we deal
24 with these sorts of issues.

12:19:38 25 MS. KELLY: Sure. You're absolutely right,

1 Your Honor.

2 And I'm sorry, I didn't know if you were
3 done.

4 THE COURT: Yeah.

12:19:43 5 MR. KELLY: That's absolutely right, and
6 that's certainly the statement that the two cases that
7 the Government cites in response to our argument stand
8 for.

9 But I think in this case, the specific
12:19:52 10 danger with respect to a jury instruction is the fact
11 that Count 48 is a conspiracy charge. And it's a charge
12 of conspiracy against Mr. Spivak, and -- who is her
13 husband, my client's husband, and she is also charged
14 with conspiring with him in the first two counts.

12:20:10 15 So the danger is while she conspired with
16 him, you know, in this -- she must be the person who
17 conspired with him or one of them in Count 48 so she must
18 have also conspired with him with respect to Counts 1 and
19 2.

12:20:23 20 And that, that's where the sort of novel
21 danger in this case arises that doesn't guarantee that a
22 jury instruction would prevent the prejudice that we're
23 talking about.

24 And actually, Your Honor, if you look at
12:20:37 25 the cases that we've cited in our brief, they sort of

1 support that same kind of thinking.

2 And even the cases, I know we cited a
3 couple of cases where the relief we were requesting was
4 not granted, but that's because those cases, they sort of
12:20:51 5 demonstrate the line between the relief being merited and
6 the relief not being merited.

7 And I think a good example of that that is
8 particularly applicable to this case is *Emond* or *Emond*.
9 It's a Seventh Circuit case from 1991 that's cited in our
12:21:06 10 brief. It's a RICO case. It was a village manager and
11 his wife. The village manager was charged with numerous
12 offenses involving his misconduct while he was in his
13 position, and he and his wife were both charged with tax
14 evasion, and they wanted to separate the tax evasion
12:21:21 15 counts out.

16 The District Court denied and the Seventh
17 Circuit ultimately affirmed that decision. But it noted
18 that it thought that the District Court was sort of maybe
19 at the outer limits of its discretion in denying that
12:21:36 20 relief.

21 And one of the things that the Court said,
22 you know, this is the reason that we aren't finding error
23 here and that is the strength of the counts against the
24 wife, so we aren't so concerned that there was jury
12:21:50 25 prejudice here.

1 And that is not, you know, our position, of
2 course, is that that doesn't apply because of the
3 thinness of the allegations, at least, against
4 Ms. Smirnova.

12:21:59 5 And that Court also took a moment to
6 discuss Ms. -- the wife's, excuse me, the wife's argument
7 that if you do a jury instruction in this instance, you
8 know, first of all, there's always the danger that, on
9 repetition, jury instructions lose their effect, but it
12:22:16 10 also said, the Court also recognized the argument that,
11 you know, if the Court's giving these instructions about
12 the wife who was alleged to have engaged in behavior or
13 conduct, excuse me, with her husband, and you tell the
14 jury that it can't consider that, it piques its interest.

12:22:31 15 And I think particularly in a case like
16 this one where you have a conspiracy charge in Count 48
17 and two conspiracy charges at the top of the indictment,
18 and the jury's going to, "Well, what's going on, now we
19 got to think about it," and I think that presents a
12:22:47 20 particular danger in this case.

21 THE COURT: Yeah, I understand that
22 concern.

23 That's not been my experience with juries.
24 After every trial, I talk with the jury, it's one of the
12:22:55 25 two best parts of the job, and they take the instructions

1 pretty seriously in my experience.

2 MS. KELLY: Sure.

3 And I certainly wasn't denigrating, you
4 know, what juries do.

12:23:05 5 THE COURT: No, I didn't hear you to be
6 saying that.

7 I'm commenting more on the argument itself,
8 and I didn't take you to be denigrating.

9 MS. KELLY: Oh, okay. Thank you, Your
12:23:13 10 Honor.

11 But I think in particular in this case,
12 because -- and I don't mean to sound like a broken
13 record, but we've got conspiracy with husband and wife at
14 the end and conspiracy with husband and wife at the top,
12:23:23 15 and I think that that creates a situation where a jury
16 might potentially give less heed to the Court's
17 instruction about this issue.

18 THE COURT: I'm still working through the
19 arguments on these various motions and thinking about
12:23:38 20 them and the like.

21 So I'm going to ask you a question and
22 don't take it as this is, like, where I'm going or
23 anything. It's just something I've been kicking around,
24 and let me get your thoughts on it.

12:23:51 25 It's occurred to me that one way to deal

1 with this issue would be to try these counts separately
2 which would be to say we'll have one jury, because I
3 think the Seventh -- I'm sorry -- the jury trial right in
4 the Sixth Amendment and under Article III is for one
12:24:11 5 jury.

6 So we would just simply -- I don't -- if we
7 go down this path we'd have to talk about what the
8 jury -- what the proof would look like on these counts,
9 but it doesn't strike me as, you know, as an evidentiary
12:24:22 10 matter; we're talking about three additional days on
11 these counts or anything.

12 I think you would have a jury come back,
13 return whatever verdict it returns, Counts 1, 2, and the
14 related substantive charges, and then say, "Ladies and
12:24:36 15 Gentlemen, one more thing we need you to do.

16 "We've got a couple more witnesses we need
17 you to listen to, you'll be out of here tomorrow," or
18 whatever the time frame is, and then try these counts
19 separately.

12:24:45 20 That seems to me at least -- I'm kicking
21 that around. There might be some practical
22 considerations in terms of witness availability and so
23 forth. There might be some other issues I'm not thinking
24 about. I'm sure there are.

12:25:00 25 But it seems to me that there's no

1 prejudice to your client or any others in that world.

2 MS. KELLY: Well, I can tell Your Honor
3 that one of the cases that we cite in our brief, *Moore*
4 from the Northern District of Michigan, that's exactly
12:25:13 5 what the Court did.

6 That case, I mean it was really different
7 circumstances. One of the counts was a felon in
8 possession, and the other counts were unrelated to that.
9 And so the Court had the trial on the substantive other
12:25:24 10 counts, and then it had, same jury, a trial on the felon
11 in possession.

12 So that's certainly something that would be
13 within the Court's discretion to do.

14 And, you know, in terms of the prejudice
12:25:33 15 that we're concerned about, so long as, you know,
16 evidence about Ms. Smirnova's conduct as alleged in
17 Counts 48 through 50 didn't come in --

18 THE COURT: I mean, presumably it wouldn't
19 come in on the other counts.

12:25:49 20 MS. KELLY: Sure, Your Honor.

21 And that actually goes to the Government's
22 second argument which is a 404(b). The Government says
23 in its brief that evidence about Ms. Smirnova's conduct
24 with respect to those final three counts will be
12:26:01 25 admissible to show consciousness of guilt, intent and

1 knowledge. That's on Page 14 of their brief under
2 404 (b) .

3 It doesn't really develop that argument,
4 and I think it might be because the Government would be
12:26:12 5 hard-pressed to do that.

6 The conduct that's at issue in Counts 48
7 through 50, they just don't have any bearing on those
8 issues with respect to conspiracy to commit securities
9 fraud. They happened while her husband was in detention.
12:26:26 10 They relate to that issue.

11 I'm not certain how, you know, recorded
12 conversations with her husband where he's telling her,
13 you know, "Make sure that the agents who are coming to
14 search our house can find the weapons," and she's telling
12:26:40 15 him, you know, "Let's wait to see what your attorney
16 says, let's do what your attorney says," have any bearing
17 on the issues that make other acts evidence admissible
18 under 404 (b) .

19 THE COURT: All right. Thank you.

12:26:56 20 MS. KELLY: Thank you, Your Honor.

21 THE COURT: Other, other defendants?

22 Mr. Rosen?

23 MR. ROSEN: Yes, sir.

24 Maybe three trials in front of the same
12:27:23 25 jury.

1 Your Honor, we are moving for a severance,
2 a relief from prejudicial joinder under Rule 14 for
3 between Counts 1 and Count 2 along with substantive
4 Counts 8, 9, 10, 29, 30, 31, 32 and 33.

12:27:45 5 Those are the substantive counts of either
6 transactions or wire, wire fraud.

7 And, Judge, as I think through my argument
8 to the Court on this, I'm going to ask Your Honor to have
9 both the practical aspect of my argument in front of
12:28:07 10 twelve jurors and the legal side to this issue because I
11 think in certain ways they are sort of inseparable.

12 How is a jury going to be able to
13 conceivably distinguish between evidence where a
14 defendant is not charged but a charging document
12:28:30 15 incorporates into the Count 2, where Mr. Bongiorno is not
16 charged, allegations, and then the jury is supposed to
17 hear all of this?

18 So there's a practical and a legal approach
19 to this.

12:28:43 20 THE COURT: Well, why isn't -- I have the
21 same question.

22 Why isn't a jury instruction at the end of
23 the day sufficient to protect Mr. Bongiorno's interests
24 in front of a jury on that?

12:28:58 25 MR. ROSEN: Well, because it's impossible.

1 It's -- I respect this Court's statement
2 that a jury does follow -- and I reference *Bruton* in my
3 case not for the confession aspect of it, but if I may
4 just turn for a moment to my notes on that -- the effect
12:29:23 5 of a nonadmissible declaration cannot be wiped from the
6 brains of the jurors. Every piece of evidence pertaining
7 to Count 2 will be virtually identical, if not identical.

8 THE COURT: It's a different time period.

9 MR. ROSEN: But-for the time period.

12:29:48 10 THE COURT: I mean, that's a pretty
11 important difference.

12 MR. ROSEN: It is.

13 THE COURT: I mean, I think -- I think a
14 jury would understand time travel.

12:29:54 15 MR. ROSEN: So here's my -- here's my
16 response then because that is the singular distinction.

17 Now I'm going to go to the practical side
18 of this. If these folks are going to be taking notes, or
19 not and just listening --

12:30:10 20 THE COURT: I allow them to take notes.

21 MR. ROSEN: Yes, sir.

22 I've given up objecting to that.

23 THE COURT: You can object. It's
24 overruled.

12:30:19 25 MR. ROSEN: Fair enough.

1 Because the same witnesses, the same
2 allegations, the incorporation of Paragraphs 26, 27, 29,
3 33, 34, 35, 38 and 41 are incorporated into Count 2,
4 which Mr. Bongiorno is not charged, and overt acts FF,
12:30:58 5 GG, HH, II, JJ, KK, NN, OO, RR and EEE.

6 THE COURT: We're going to have to talk to
7 the U.S. Attorney's Office about that numbering system.

8 MR. ROSEN: Seventeen different criminal
9 allegations of fraudulent conduct are being introduced in
12:31:24 10 this trial having nothing to do with Chris Bongiorno.

11 Seventeen criminal, different criminal
12 allegations in the same case where he is charged in
13 virtually identical conduct, and you're going to ask this
14 jury to remember, to notate the distinction and dates, I
12:31:50 15 think puts an undue pressure and undue practicality.

16 THE COURT: Well, in addition to the jury
17 instruction, doesn't trial practice protect your client
18 on that in the sense that -- and I don't know how -- I
19 mean, you're all going to have to try your cases if we
12:32:08 20 have, you know, one or more trials or however that all
21 unfolds remains to be seen, but for the sake of argument
22 here, I would assume at trial -- again it's your case,
23 it's your client, you can do what you want -- but I would
24 assume that when there's a witness on the stand, you're
12:32:23 25 going to stand up and cross-examine the Government's

1 witness and emphasize, as long as I'll let you do it, you
2 know, to the jury that this doesn't have anything to do
3 with your client on Count 2.

4 And so now you have the jury instruction
12:32:41 5 reinforcing what they sat through, you know, for a day, a
6 week, two weeks, whatever it is, and they're remembering
7 you doing that, they're checking their notes, they're
8 seeing that, and they have the jury instruction.

9 I guess I think about all of that, and I
12:32:54 10 wonder why that doesn't accomplish what you're seeking to
11 accomplish through the motion.

12 MR. ROSEN: Because I think the Court is
13 asking more than the human brain, the human juror sitting
14 in a courtroom is going to be able to accomplish.

12:33:11 15 It's -- if there was a distinction in the
16 nature of the allegations -- and, Judge, just as an
17 example because it doesn't affect me -- if you were to
18 look at the obstruction counts which I have not moved to
19 sever, and you say "Now, Ladies and Gentlemen, these
12:33:28 20 counts, this evidence is not coming against
21 Mr. Bongiorno, he's not charged in this count," and then
22 the Government produces its obstruction evidence, you
23 have a very clear ability, a clear line of information
24 that's going into a jury's head.

12:33:47 25 But two points. One, it's so identical

1 that I think asking the juror to remember and to
2 segregate, I mean are we going to stop every witness and
3 say, "Now, this question only pertains to 21 and 22; not
4 19"? That's not going to happen. It's just going to
5 come in.

12:34:07

6 And they are going to be assessing the
7 culpability of four individuals. Their job is to assess
8 each person's guilt or innocence, the Government's proof
9 as to each person's guilt or innocence, and then
10 segregate out from the same witness the time parameters
11 when, in fact, the conduct's going to be alleged the
12 same.

12:34:24

13 But more than that, and I think this may be
14 the legal side to this argument because the Court's
15 asking me about the practical side: This indictment is,
16 in my judgment, fatally flawed because of how it
17 incorporates into Count 2 the previously described
18 paragraphs that is going to go back to the jury.

12:34:36

19 I mean, it's not evidence, but they're
20 going to have this indictment.

12:35:03

21 THE COURT: I don't know about that.
22 I actually haven't ever sent an indictment
23 back --

24 MR. ROSEN: Okay.

25 THE COURT: -- to the jury.

12:35:11

1 I mean, I'm open to doing that if --

2 MR. ROSEN: Well, my experience is Courts
3 have done that.

4 THE COURT: Subject to discussion.

12:35:22 5 MR. ROSEN: And again to my point --

6 THE COURT: I also haven't tried an
7 indictment that's 60 pages long, so there's a first time
8 for everything.

9 MR. ROSEN: It's a lot, Judge. It's a lot
12:35:34 10 of allegations. It's a lot of conduct. And that sort of
11 bleeds into my observation of I don't think it's
12 possible.

13 I mean, look at the *Bruton* case. They
14 basically are acknowledging there are some things that
12:35:46 15 just cannot be reasonably expected of a juror. And
16 because not only do the allegations in Count 1 get
17 incorporated into Count 2, but the testimony's going to
18 be identical.

19 THE COURT: Just so I'm clear, what you're
12:36:02 20 seeking in your motion is to try Count 1 and Count 2
21 separately?

22 MR. ROSEN: Yes, sir.

23 THE COURT: Yeah. Okay.

24 As I understand it, it just read large on
12:36:12 25 the defense side. We have every -- we have every motion

1 just about every which way.

2 MR. ROSEN: Let me see if there's --

3 THE COURT: That's good. I just want to
4 check them all off.

12:36:23 5 MR. ROSEN: That's fine.

6 THE COURT: They're on my criminal
7 procedure bucket list.

8 MR. ROSEN: I had cited two Sixth Circuit
9 cases. Let me just summarize each of them.

12:36:35 10 THE COURT: Sure.

11 MR. ROSEN: The *Soto* case, which is on
12 Page 3 of my motion, they look to the following to
13 determine improper prejudice: Was the evidence
14 intertwined; similarities and differences between the
15 evidence; the strength of the Government's case; and the
16 ability to separate the evidence.

17 I'm the first to acknowledge the obvious
18 which is it's a different time frame, but it's asking the
19 jury to, every time it hears a sentence from a witness
12:37:06 20 about an event, to segregate as to each of these
21 allegations, for I don't know how many weeks, these two.

22 And I think when they get back to that jury
23 room, it's going to be, "When was that again?" And I
24 would expect them to write down the date of each line of
12:37:25 25 testimony and when that comes in because they're so

1 identical.

2 The other -- the other case I cited was the
3 *Davis* case. Joinder is not prejudicial, not prejudicial,
4 if, had two counts been tried separately, the evidence on
12:37:40 5 each count would have been admissible in the other trial.

6 None of this evidence is admissible against
7 Mr. Bongiorno as to Count 2 because it is a separate
8 date, but the ability of a juror for a period of weeks to
9 hear the same witness talk about the same acts and then
12:38:02 10 expect them to be able to, in the back when they're
11 deliberating, bring back a fair and reasonable verdict,
12 we're never going to know.

13 Not that the Court couldn't instruct them.
14 I just think it's to my first point, it's going to be
12:38:17 15 impossible.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 MR. AXELROD: Your Honor, if I could just
19 briefly address the last severance argument.

12:38:22 20 THE COURT: Sure.

21 MR. AXELROD: We did not file a motion to
22 sever on behalf of Paul Spivak.

23 THE COURT: I was mistaken.

24 MR. AXELROD: No, we did not.

12:38:28 25 We did not.

1 But --

2 THE COURT: Did you move to join all of the
3 other ones?

4 MR. AXELROD: We did not do that either, of
12:38:35 5 course, because I'm hoping, and I believe that the motion
6 should be dismissed, but -- the motion should be granted
7 and the case should be dismissed.

8 But today and hearing Mr. Abreu and, in
9 fact, a question Your Honor asked raises a really
12:38:48 10 important point. If the Government seeks to establish
11 predisposition for Count 2 based on Count 1, that creates
12 a significant problem for Mr. Spivak.

13 Sixth Circuit jury instruction 2.01A is
14 about separate consideration for a single defendant
12:39:07 15 charged with multiple crimes. And of course, you know
16 this, it instructs the jury that each count is to be
17 considered separately.

18 However, if Your Honor charges -- if Your
19 Honor tries Counts 1 and Counts 2 together, the
12:39:20 20 Government will be arguing, "Jury, you should convict on
21 Count 2 because of what Mr. Spivak did on Count 1,
22 because of predisposition," which will go against the
23 jury instruction, the pattern jury instruction, which
24 will allow the Government to buttress Count 2 because of
12:39:38 25 Count 1, and then, of course, they'll buttress Count 1

1 because of Count 2.

2 So it's just a lot of bootstrapping, which
3 I think is improper.

4 I think the cleanest thing to do is to try
12:39:48 5 Count 1 altogether. Every defendant here is involved in
6 that case should the Government -- should Your Honor
7 decide not to dismiss it, which I think you should.

8 And then of course, dealing with the
9 practicalities of that, if Mr. Spivak is convicted on
12:40:01 10 Count 1, of course the predisposition argument, I'm not
11 going to prejudge it, but probably goes away for Count 2.

12 However, the flip side is if he's
13 acquitted, it probably also goes away.

14 So it's a very clean way of avoiding
12:40:19 15 significant spillover prejudice between Count 1 and Count
16 2 for Mr. Spivak, and potentially gaining efficiencies
17 for the Court.

18 Thank you.

19 THE COURT: All right. Thank you.

12:40:28 20 Mr. Abreu.

21 MR. ABREU: Thank you, Your Honor.

22 Your Honor, just because I'll probably
23 forget what I was going to say, I'll address that last
24 point first.

12:40:40 25 The Government isn't going to try to prove

1 that Mr. Spivak was predisposed to commit a crime with
2 Count 1 unless they raise the defense that he was
3 entrapped and he's not predisposed, and we have to do
4 that. Right?

12:41:02 5 That's what your Honor was warning them
6 that they would be inviting a problem for themselves if
7 they were to raise this defense, and they should consider
8 that.

9 That's a problem that they would create.

12:41:11 10 That's not a -- the two counts can stand on
11 their own. The evidence is sufficient for both counts.
12 But if they say that Mr. Spivak is not predisposed to
13 commit securities fraud, then the evidence from Count 1
14 rebuts that. But that's something that they would
12:41:31 15 invite. That would be an invitation on their part.

16 Going back to Mr. Scott, Mr. Scott's motion
17 relative to the statements made by Mr. Spivak, you know,
18 I think what that really boils down to is a 403 argument,
19 that the statements are so prejudicial that they, you
12:41:54 20 know, outweigh any probative value, and then I think it's
21 a premature stage to consider that.

22 I think that's a motion in limine issue.
23 And I don't think that the statements are unduly
24 prejudicial. They are prejudicial. Every piece of
12:42:12 25 evidence that I'm going to introduce against the

1 defendants is prejudicial.

2 THE COURT: I would hope so.

3 MR. ABREU: Right.

12:42:19

4 THE COURT: Otherwise, I would question
5 whether it's relevant.

6 MR. ABREU: Right.

7 But the question is is it so unduly
8 prejudicial when a co-defendant is making statements in
9 furtherance of the conspiracy?

12:42:27

10 If there are disputes about that and
11 particular statements, I think that that's better handled
12 closer to trial in a motion in limine, and can be
13 addressed either by the Court excluding particular
14 statements or certain kinds of redactions.

12:42:45

15 The Government has done that in other cases
16 for *Bruton* issues.

17 It doesn't require severance for the
18 defendant.

12:43:07

19 Relative to Mr. Bongiorno, actually I'll go
20 back to Ms. Smirnova because I think she was -- she was
21 the second defendant to -- her argument was second. I
22 guess hopefully I can cure the prejudice right now and
23 say that I will tell the jury that she is not a
24 co-conspirator in Count 48.

12:43:24

25 She wasn't charged in that count because

1 she clearly told her husband, "Kevin Spellacy said not to
2 talk to that guy, I don't want to talk to him, I don't
3 want to say anything to him, you shouldn't say anything
4 to him, you shouldn't have people say anything to him."

12:43:41 5 That's why she wasn't charged, she's not a
6 member of that conspiracy.

7 I don't -- now, the Count 50 issue about
8 the computers and why the -- her knowledge of the
9 computers is probative is because she knows what a
12:43:54 10 computer from the Richard Mallion days contains, evidence
11 of securities fraud.

12 That's why it's relevant.

13 But I have no intention of asking the jury
14 to convict or try to confuse the jury into convicting
12:44:14 15 Ms. Smirnova with a crime she didn't commit.

16 She was -- I actually, when I listened to
17 that jail call, I applauded for her because I was like
18 she's a lot smarter because she's following, you know,
19 Mr. Spellacy's advice.

12:44:26 20 And that's important because Mr. Spivak
21 plows right through that, says, "Okay, okay, yeah, I'll
22 listen to that," and then makes a call two minutes later
23 to Anthony Corpora telling him to go talk to the witness
24 again.

12:44:41 25 I think the jury is not going to be

1 confused. I think that if anything, it's to
2 Ms. Smirnova's benefit to show that she did not commit
3 that crime.

4 And as to Mr. Bongiorno --

12:45:03 5 THE COURT: I mean, I suppose the risk
6 there is a jury hears a statement of one defendant who
7 happens to be married to another, and to kind of
8 Mr. Bongiorno's point doesn't, in the course of a lengthy
9 trial, doesn't draw these fine lines, and I take your
10 point, but they may not see it the same way you do.

11 They may say that, "We don't -- we don't
12 like what Spivak is saying here, for example, and, you
13 know, they're a married couple so, you know, they rise
14 and fall together."

12:45:46 15 MR. ABREU: That would -- that would
16 require them to do something illegal because the Court
17 would be giving an instruction for them not to do that,
18 and I don't think that the legal standard is that we
19 would presume that the jury is going to disregard the
12:46:03 20 Court's instructions and the evidence that's going to be
21 presented at trial that's going to be clear, and
22 counsel's arguments.

23 I know it doesn't matter what I say right
24 now and that anything I say at trial isn't evidence, but
12:46:19 25 there's -- we're not running from the facts on this.

1 There's ample evidence to convict Ms. Smirnova of Count 1
2 and Count 2, and she did the right thing with respect to
3 Count 48.

4 I have no issues telling the jury that, and
12:46:37 5 I don't think they are going to be confused or hold it
6 against her that her husband plowed through and did that
7 anyway.

8 THE COURT: What about trying Count 1 and 2
9 separately? I mean, they're different time periods.
12:46:52 10 They're complicated financial transactions with a lot of
11 wire transfers and recordings and so forth.

12 And in terms of just keeping the evidence
13 straight and keeping the jury focused on what's in front
14 of them, why not try those separately?

12:47:10 15 I appreciate that there's some efficiency
16 issues there, but I mean if we're being honest about it,
17 this is not the most efficient dispute resolution system
18 in the world, so there's other values.

19 But why not try them separately?

12:47:24 20 MR. ABREU: Well, I mean, that's a fair
21 point, Judge, because I think I haven't decided how the
22 Government's case, we would present a case, but typically
23 based on the way we've charged this case, we would be
24 presenting evidence on Count 1 first and then we would
12:47:43 25 switch to Count 2 where we generally try to be very clear

1 about which count we're introducing evidence on,
2 especially at opening and how we organize our witnesses.

3 Do I think that -- but I don't think that
4 we need to, you know, submit all the evidence on Count 1,
12:48:03 5 stop, have a verdict, proceed on Count 2, stop, have a
6 verdict, and then continue to the rest of the counts.

7 THE COURT: Well, might that not be more
8 efficient in some way? I mean, it's possible.

9 I mean, you all are far closer to both the
12:48:22 10 facts and where your respective clients are at, but it's
11 possible if the jury returned a verdict one way or the
12 other on Count 1, that we don't need to try the rest.

13 It might be that there's pleas or it might
14 be that DOJ walks away from Count 2 or just, you know,
12:48:37 15 maybe the defendants don't -- maybe it doesn't matter any
16 more. Maybe, you know, if the predisposition issue goes
17 away, I don't know, anything can happen.

18 You give a jury a day off and come back and
19 maybe they don't need to come back.

12:48:54 20 I mean, I'm just thinking out loud. I
21 don't have a view.

22 MR. ABREU: Right.

23 THE COURT: Like I said, I'm working
24 through these issues.

12:49:00 25 MR. ABREU: Your Honor, I thought about the

1 same issue with respect to the obstruction counts, so 48,
2 49 and 50.

3 THE COURT: Right.

4 MR. ABREU: If we were to do the case that
12:49:12 5 way.

6 I think, although not my preference to do
7 it that way, I think that, you know, that is probably,
8 out of all of the arguments that have been made by
9 defendants, that's probably the one with the most merit.

12:49:25 10 THE COURT: That's high praise from where
11 you sit.

12 MR. ABREU: But again, I don't think it's
13 necessary because I don't think the defendant, the other
14 defendants are going to be prejudiced by it.

12:49:40 15 But I think that separating Count 1 from
16 Count 2 would present different kinds of issues because
17 when would jeopardy attach, right?

18 So if the jury came back with a not guilty
19 on Count 1, not that I would do this, but the United
12:49:57 20 States may dismiss without prejudice Count 2 just to
21 refile it because I want a different jury.

22 I could see, you know, that could be
23 something that would happen. I don't think that's fair
24 to the defendants. I don't think that's particularly
12:50:15 25 efficient or what is intended in our criminal justice

1 system.

2 You know, if we're going to have one jury,
3 then we would want one jury to decide all of the issues.

4 But if we sort of take it piecemeal, it would be

12:50:35 5 problematic because different rights wouldn't attach all

6 at the same time presumably because that trial for Count

7 2 wouldn't have started. And maybe it's not me sitting

8 up here for the Government who -- and it's someone, you

9 know, who just wants to win, and they make a different

12:50:54 10 decision, or, you know, it unfairly pressures a defendant

11 to plead guilty when they otherwise wouldn't.

12 You know, I could see a host of issues that

13 would be problematic by separating out the counts like

14 that.

12:51:15 15 THE COURT: There's nothing but difficult

16 issues on every side.

17 You know, when you sail the ship between

18 Scylla and Charybdis, that's what you face.

19 MR. ABREU: True, Your Honor.

12:51:28 20 Thankfully, I don't believe most of this is

21 difficult. But I do see some merit in the obstruction

22 argument by moving that out, but the fact is Ms. Smirnova

23 wasn't involved in the conspiracy to -- you know, she's

24 not a co-conspirator in Count 48. That can be explained

12:51:48 25 to a jury without a problem.

1 I don't think there's really any prejudice
2 there.

3 And everything else can be cured by a jury
4 instruction. I mean, as to Mr. Bongiorno, the
12:51:59 5 incorporation of his name in allegations in an indictment
6 that doesn't go back to the jury, I mean there's not
7 going to be any evidence presented to them that he was
8 involved in any conduct from 2020.

9 It's -- it would have no prejudicial effect
12:52:15 10 on him, and so there isn't a reason to separate a trial
11 for him or have a separate trial for him.

12 Thank you, Judge.

13 THE COURT: All right. Thank you.

14 I believe we're down to one, one last
12:52:38 15 motion.

16 Did you need a break? All right. Why
17 don't we -- our court reporter is requesting a break so
18 why don't we take -- it's 12:50. Why don't we take a
19 10-minute break?

12:52:52 20 We're down to one motion, so we're knocking
21 them out.

22 We'll resume shortly. Thank you.

23 THE CLERK: All rise.

24 (Recess taken.)

13:15:10 25 THE COURT: Please be seated.

1 All right. So now that we've had our
2 break, we're good for another three hours on the last
3 couple motions.

4 MR. ROSEN: I'll stay under that time,
13:15:21 5 Judge.

6 THE COURT: It's a high bar.

7 All right. Go ahead.

8 MR. ROSEN: All right, Your Honor. This is
9 on DE 287, Mr. Bongiorno's motion to suppress.

13:15:29 10 On July 7th, 2023, at the U.S. Virgin
11 Islands St. Thomas airport Mr. Bongiorno was arrested.

12 I've listed several times what he was
13 carrying. I don't need to do it again.

14 It's from the face sheet of my pleading.
13:15:51 15 Upon information and belief, and I think I heard from the
16 Government today, that the arrest was based upon the
17 return of the second superseding indictment which is what
18 I had assumed.

19 And again, further based upon information
13:16:07 20 and belief, Judge, as I stand here today, there was no
21 probable cause to search -- to seize any of the items
22 based upon criminal conduct at the time. He was merely
23 going to the airport to come to Miami.

24 I think maybe Ft. Lauderdale, actually.
13:16:27 25 There were no exigent circumstances.

1 Certainly no consent, and to my knowledge no search
2 warrant.

3 And further, no probable cause to believe
4 that evidence was contained in the items that he
13:16:41 5 was -- evidence associated with this case was obtained in
6 the items he was carrying.

7 Judge, the indictment in this case, the
8 last overt act, the last day of the alleged Count 1
9 conspiracy, as best I could tell, was September 24th,
13:17:02 10 2019. The last overt act by Mr. Bongiorno was 2016.

11 So if we were to take the end of the
12 conspiracy, by my count, 1,182 days had passed between
13 the date of the close of the criminal conduct and the
14 date of the seizure of the items at issue.

13:17:27 15 So there can really be no serious argument
16 asserting a causal connection between the crimes charged
17 and the seizure of these personal items.

18 And because his wife was standing there, he
19 could have, had he been given the opportunity, to give to
13:17:45 20 her all these items that the Government took.

21 The Government's response to the motion, as
22 I try to assess it, my sense was a greater degree of lack
23 of clarity is hard to imagine.

24 The Government's response was the
13:18:14 25 Government has not accessed the user-generated -- let me

1 stop. Let me back up a second.

2 So as to -- before we get into the content
3 of this, as to the seizure itself, Judge, in my view it
4 is a hard stop at that point. They have no legitimate
13:18:41 5 basis then or today to have taken or retained these
6 items, but they have.

7 And so I think there is some hard questions
8 that the Government should answer today to this Court
9 such as what, what was the basis for the initial seizure?
13:19:06 10 Why was it taken? Because all of this, I think it will
11 help the Court assess where do we go from here.

12 Was there a search warrant obtained for the
13 seizure of these items? I don't know. Who seized these
14 items and why? I think these are questions the
13:19:29 15 Government should answer to assist the Court in
16 determining where we go.

17 And from that moment when it was taken
18 without any legal basis to do so, the Government should
19 have returned these items. And I'll just direct the
13:19:47 20 Court to docket entry 249, the defendant's notice of
21 discovery request, wherein we filed a demand for the
22 return of these illegally seized items.

23 No response.

24 So in response to our motion to suppress,
13:20:08 25 the Government states that it intends -- "As the

1 Government" -- I'm sorry, let me read the whole sentence.

2 "After counsel for defendant Bongiorno and
3 the United States discussed the defendant's
4 motion" -- and this was done in private between Mr. Abreu
13:20:27 5 and myself -- "it is his understanding," Mr. Abreu's
6 understanding, "that defendant intends to withdraw the
7 motion, as the Government has not accessed the
8 user-generated content of the devices and has no
9 intention of using anything from his seized
13:20:46 10 device/devices in this case, even if it had."

11 My response to that was if, if the items
12 had been taken and held in a locker and stayed there, and
13 the Government said, "Look, we're not going to use this
14 in this case, no one has looked at it, no one has touched
13:21:15 15 it, no one has done anything with it, here's the chain of
16 custody," all that information, I don't think the motion
17 to suppress would be well-founded because it was
18 untouched.

19 And I would have then filed a motion for
13:21:28 20 return of illegally seized property, meaning you can't
21 hold that which you shouldn't be allowed to have because
22 you took it unlawfully.

23 But that wasn't the response. The response
24 was, as I just read it. "The Government has not accessed
13:21:45 25 the user-generated content." And I'm not even sure I

1 know what that means except they -- well, let me
2 finish -- "of the device and has no intention of using
3 anything from his seized devices in this case, even if it
4 had."

13:22:01 5 To me, this means the items have been
6 seized without a warrant or probable cause, and the
7 devices have been opened.

8 That's what this says. The devices have
9 been opened.

13:22:15 10 So I think the second question that the
11 Court needs to ask, after finding out what the basis was
12 for taking it and by whom and why, is what's happening to
13 that.

14 Mr. Abreu's response, essentially,
13:22:32 15 acknowledges that it's been opened.

16 All the Government had to say was, "I found
17 out that these items were seized. I told them to lock it
18 up, leave it there. No one's touched it. Now, let's
19 deal with it."

13:22:50 20 But that's not what the Government says, so
21 I think we need to find out what's happened.

22 Because then the question becomes if
23 somebody has opened it, why, based upon what lawful
24 authority, and what have they done with it?

13:23:05 25 There's a pending criminal case.

1 This seems to insinuate that there may be
2 another investigation, but what's the lawful basis for
3 that? Hence, my motion for return of illegally seized
4 evidence.

13:23:23 5 THE COURT: My recollection is that this
6 issue was discussed one time previously, and I believe --
7 and I don't know if the record is the same, we'll hear
8 shortly -- that Mr. Abreu indicated that at trial, the
9 Government had no intention of using any evidence from
13:23:39 10 any of the devices.

11 If that remains true, then the question I
12 have regarding the motion to suppress doesn't necessarily
13 bear on the motion to return the property.

14 But with respect to the motion to suppress,
13:23:52 15 would there be standing to raise the motion?

16 And I think technically under the law it's
17 a standing question, although I think as a matter of
18 Federal Courts' practice it's probably more of a
19 justiciability issue than standing.

13:24:09 20 MR. ROSEN: If the Government has opened
21 this device, I think the Court's obliged to find out what
22 it is that has happened since then.

23 It isn't necessarily -- let me back up.

24 We have information, Judge, that this
13:24:36 25 device was at least on, if not opened, in Puerto Rico on

1 July 14th, 2023, seven days after it was seized.

2 We believe that based upon this device's
3 information -- when I say "this device," Judge, let's be
4 clear. There were two phones. There was a laptop.
13:25:04 5 There were documents. There was a voice recorder.
6 That's what was seized, so I do not know what has been
7 opened and looked at.

8 Mr. Bongiorno and Mr. Bongiorno's wife's
9 Apple ID has been accessed and subpoenaed. Bank records
13:25:22 10 have been subpoenaed. Google records have been
11 subpoenaed. All of this following a grand jury
12 indictment.

13 So if the Government has been in that
14 device and the Government has accessed information, I
13:25:39 15 think this Court needs to be sure that, in fact, none of
16 this information has gotten into this case.

17 And I accept Mr. Abreu's representation,
18 all right. But I think, based upon what a continuing
19 investigation -- if that investigation -- if there is a
13:26:00 20 continuing investigation by Mr. Fry, as an example -- and
21 I don't know that that's the case; he's been the case
22 agent in this case from the beginning -- what has -- what
23 has -- what information is it that they've obtained?

24 How are they going to not use that in this
13:26:17 25 case? What --

1 THE COURT: I guess from the standpoint of
2 the first motion regarding this issue, I'm not sure I see
3 it any differently than any item not turned over in
4 discovery.

13:26:30

5 Right?

13:26:46

6 Like presumably, if the Government intends
7 to introduce evidence at trial or moves to do so and it
8 hasn't -- it's not part of those two to four terabytes, I
9 assume everybody on this side of the room is going to
10 jump up and raise, you know, any number of complaints to
11 high Heaven.

12 I would have no intention of allowing that
13 evidence.

13:26:56

14 So I'm not sure, you know, to go back to my
15 original question, if the Government is not -- I'm not
16 sure I even need to get into this issue from an
17 evidentiary standpoint.

13:27:09

18 And is it, whether you call it standing or
19 something else, if the Government is not, in fact, going
20 to be using any data removed from any device that was
21 seized with or without a warrant and so forth, does
22 that -- I mean, what is there really for me to decide if
23 they're not going to do that?

13:27:24

24 MR. ROSEN: I think there needs to be
25 certainty that that's the case.

1 And it isn't necessarily -- Judge, it isn't
2 necessarily a document. I mean, it's information.
3 That's just as much of a piece of evidence obtained that
4 could have lead them to learn something.

13:27:40 5 So my best answer to the Court is it
6 is -- it is if there is no evidence that came from those
7 devices, the Court then does have to go to were the
8 devices lawfully taken in the first place.

9 That again is the full stop for me.

13:28:03 10 After that, in terms of the motion to
11 suppress --

12 THE COURT: Well, I guess -- I guess from
13 the motion to suppress standpoint, let's assume for the
14 sake of argument that the devices were unlawfully seized,
13:28:17 15 in fact you can even assume that they were unlawfully
16 searched as well, if the Government is not seeking to use
17 any information from that and we have proper assurance of
18 that, I mean why, why is there a motion that I need to
19 decide?

13:28:31 20 MR. ROSEN: If -- my question back to me,
21 what is a proper assurance? Okay. That's, to me, the
22 question.

23 And if a document has not been turned over
24 to me that came from that device, my response back would
13:28:50 25 be is that enough. Because if there's information that

1 was obtained, again, for example, how do we know if an
2 agent associated with this case has looked at something
3 and how do we know that that information didn't allow
4 them to ask a witness a question?

13:29:06 5 That's the same thing. It isn't just a
6 document.

7 So I don't know how -- I mean, I understand
8 the Court's question. I mean, it's plainly apparent.

9 But how do we determine, unless we hear
13:29:20 10 testimony, who has accessed it, who hasn't seen it?

11 I mean, if Agent Fry takes the stand and
12 says, "Listen, there was a Chinese wall set up and
13 everybody associated with this case has not had one iota
14 of viewing of it," all right, fine.

13:29:39 15 I mean, that's the adversarial process at
16 issue, right?

17 Then we move on to the next motion which is
18 return of the evidence.

19 But I need to know that. I need to know
13:29:51 20 that nobody associated with this case has looked at it;
21 who the agents were that did look at it. I mean, I think
22 we need to know what happened to it.

23 And then I think the question is, that's
24 suited to the Court, okay, now I've heard and I can
13:30:06 25 determine that the motion is unnecessary because it has

1 not impacted this case whatsoever.

2 But I don't think the fact that -- a
3 document alone is not going to resolve it. It is the
4 issue and the information and what was done with that.

13:30:19 5 And the only way to determine that is by
6 finding out who has accessed it and what's happened with
7 it.

8 Then I think the Court's question becomes a
9 more appropriate one.

13:30:29 10 THE COURT: In terms of returning the
11 property, then what's the right venue for that?

12 My understanding of the law, I'll tell you
13 I spent a couple days on this a few years ago. The law
14 was not real clear, I'll confess, but my best read of it
13:30:47 15 was that motions for return of property are separate
16 civil actions that are best brought where the property
17 is.

18 It's kind of a *quasi in rem* proceeding, if
19 you will.

13:31:00 20 MR. ROSEN: There's actually a criminal
21 rule, I think I cited to, which does state -- let me see
22 if I can get the Court the rule.

23 THE COURT: Is it 41(g)?

24 MR. ROSEN: I think (g).

13:31:10 25 THE COURT: And motion filed in the

1 district --

2 MR. ROSEN: Yes.

3 THE COURT: -- where the property was
4 seized.

13:31:12 5 So --

6 MR. ROSEN: And it says -- okay. And
7 again, you know, not to include conversations that we
8 had, but I felt -- and I did think about it before I said
9 it -- that it was agreed to and appropriate that if we
13:31:28 10 filed this motion, that the Government had agreed that it
11 would be appropriate to have it here because it's all
12 connected to this one case.

13 So if they're withdrawing that, then
14 they're withdrawing that.

13:31:43 15 THE COURT: You don't want to make a trip
16 to the Virgin Islands?

17 MR. ROSEN: Virgin Islands? As long as
18 there's no outstanding warrant for my arrest, I'm good to
19 go.

13:31:52 20 So anyway, Judge, the issue is, as I spoke
21 to you about the motion to suppress.

22 And then if we reach that motion for
23 return, I think the Court has the authority to conduct a
24 hearing here, and I think it would be appropriate to do
13:32:09 25 so.

1 THE COURT: All right. Thank you.

2 MR. ROSEN: Sure.

3 THE COURT: Mr. Abreu.

4 MR. ABREU: Thank you, Your Honor.

13:32:16 5 Just briefly.

6 There's no legitimate basis for this
7 motion. There's no evidence to suppress.

8 Mr. Rosen is asking for relief that the
9 Court can't grant. There's no evidence being introduced.

13:32:33 10 You know, at the beginning of his statement
11 "Mr. Abreu's word is good enough," and then, "No, now we
12 need a hearing so I can ask questions of every agent
13 about things that don't pertain to this case."

14 There's a reason the Rules are set up the
13:32:49 15 way they're set up, and suppression motions require
16 evidence that's supposed to be introduced.

17 If there's -- if there are materials that
18 the Government needs to turn over, according to Rule 16
19 it will do that when it has it. And so that's -- that is
13:33:13 20 the reason that we argued that the motion is moot.

21 We indicated such at the last pretrial.

22 And I will talk about the conversations I had with
23 Mr. Rosen because he's an officer of the Court and I took
24 his word for it when he said if you just, you know, put
13:33:28 25 it in writing that you guys haven't looked at the phones,

1 I'll dismiss the motion.

2 Okay. So we did that. We haven't looked
3 at the user data.

4 You know, Mr. Rosen wants a criminal
13:33:43 5 justice system that answers to him about every
6 investigation that the Government has. He's looking for
7 an answer to a question he knows, because he told the
8 Court that we've subpoenaed Apple iCloud accounts and
9 we've subpoenaed other information.

13:33:59 10 And if subpoenas were issued and they
11 weren't trial subpoenas, it's a grand jury subpoena, it's
12 likely there's another investigation.

13 That's not a secret because I told
14 Mr. Rosen that the last time we talked.

13:34:12 15 So there's -- and he knows what the
16 investigation is about because it's conduct that his
17 client brought to us and said, "Well, I wasn't doing
18 anything wrong," and he lied about it.

19 And that's why we stopped negotiating with
13:34:32 20 him, because he would not be a credible witness even if
21 we did what he wanted to do and gave him a -- gave him a
22 pass and didn't charge him. He was lying to us then.

23 He knows the conduct that he's engaged in,
24 but it's a separate matter. It's not before this Court.

13:34:54 25 If he wants the return of property, you

1 know, I guess that is what I took issue with is, you
2 know, on one hand, you know, not -- we try to be cordial
3 in this business, especially amongst lawyers, and I know
4 that's important to the Court, but what's particularly
13:35:14 5 frustrating is this kind of scenario where then it
6 becomes, you know, at this point everything has to be in
7 writing.

8 And, you know, I don't like for things to
9 devolve to this level, but, you know, this motion to
13:35:34 10 dismiss or, I'm sorry, the motion to suppress, you know,
11 isn't proper here.

12 And the motion to return property isn't
13 properly venued here. And even if it were, he would need
14 to file a new civil action to have the property returned.

13:35:53 15 And then, you know, that Court, even if it
16 was related and it came back to Your Honor, we'd have to
17 talk about what the reasons were that it was seized and
18 go from there.

19 But it has nothing to do with this case.
13:36:08 20 It has nothing to do with these other defendants. And so
21 the motion should be denied.

22 THE COURT: All right. Thank you.

23 As best I can tell, that's all of the
24 pending matters.

13:36:36 25 So I have additional work to do. I do

1 appreciate your arguments that are helping focus me and
2 clarify some of the issues and things I need to be
3 working on.

4 So thank you, all, for that.

13:36:50 5 I will get you a ruling as promptly as we
6 can.

7 I know we have a schedule pending. I'm not
8 sure offhand what our next date is, but I'll get you a
9 ruling promptly, and we will move the case forward,
13:37:05 10 assuming there's counts that are not dismissed.

11 And if there are, we'll figure out what the
12 schedule looks like, what the case looks like after the
13 ruling.

14 So thank you, everyone.

13:37:17 15 Are there other matters we should address
16 before we adjourn for the day?

17 Mr. Abreu for the United States, anything
18 on your agenda?

19 MR. ABREU: Your Honor, just a procedural
13:37:27 20 issue.

21 How does the Court -- I've had different
22 experiences in different courtrooms with respect to bond
23 violations.

24 Do you -- does the Court prefer motions
13:37:38 25 being filed with the Court, or that information being

1 passed to Pretrial and receiving the information that
2 way?

3 THE COURT: Well, I think that I'm aware of
4 one report that came back from Pretrial, and I was going
13:37:51 5 to take that up today, but immediately after we adjourn
6 this proceeding with the appropriate counsel.

7 So don't go anywhere.

8 MR. ABREU: Okay. But that wasn't -- it
9 wasn't anything specific.

13:38:01 10 It was just a --

11 THE COURT: In general.

12 MR. ABREU: In general.

13 THE COURT: I generally get reports from
14 the Probation Office or Pretrial Services in this case.

13:38:08 15 MR. ABREU: Okay. Thank you, Judge.

16 THE COURT: Anything else on the defense
17 side?

18 MR. AXELROD: Nothing, Your Honor.

19 THE COURT: All right.

13:38:15 20 MR. McCAFFREY: No, Your Honor.

21 MR. DeVILLERS: No, Your Honor.

22 THE COURT: All right. Well, we are
23 adjourned.

24 Why don't we take a short break, and then
13:38:23 25 we'll reconvene on the separate matter?

1 Those of you who aren't affected are free
2 to go.

3 Thank you.

4 THE CLERK: All rise.

13:38:32 5 (Proceedings concluded at 1:38 p.m.)

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7 C E R T I F I C A T E

8 I certify that the foregoing is a correct
9 transcript from the record of proceedings in the
10 above-entitled matter.

11

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14 /s/Susan Trischan
15 /S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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